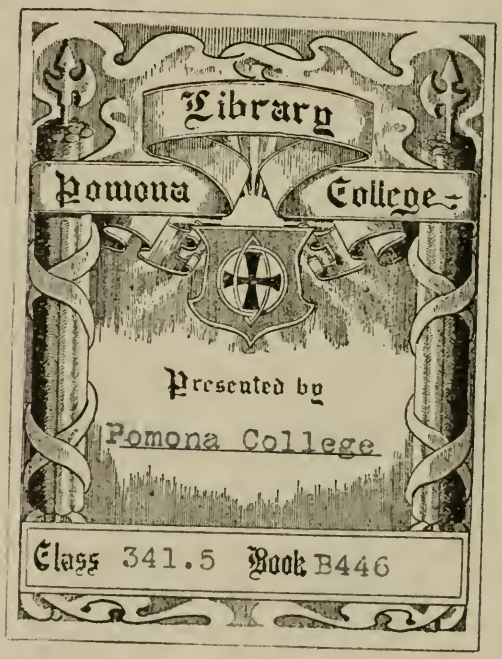
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THE LAW

OF

PRIVATE PROPERTY IN WAR,

WITH A CHAPTER ON CONQUEST.

(BEING THE YORKE PRIZE ESSAY FOR 1906.)

BY

NORMAN BENTWICH.

(*Sometime Scholar of Trinity College, Cambridge, and Whewell Scholar of International Law.*)

Lux Gentium Lex.

"Les peuples doivent en paix se faire le plus de bien, et en guerre le moins de mal possible."—MONTESQUIEU.

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HOC OPUSCULUM

JURISPRUDENTIÆ PRIMITIAS MEÆ

SUMMA CUM VERECUNDIA

DEDICO

FILIUS PATRI

TIRO JURIS-PERITO.

PREFACE.

This book is based upon the Essay which won the Yorke Prize at Cambridge University in 1906; and the Author's chief excuse for adding to the already unwieldy mass of literature, which is being piled up about International Law, is that, by the regulations which govern the Prize, publication has been thrust upon him. It is hoped, however, that the treatise may find some small justification beyond this compulsion. Undoubtedly the subject with which it deals is "in the air." The events of the war between Russia and Japan and the approach of the meeting of the second Hague Conference, which it is hoped will form a code of the laws of war on sea, have combined to arouse public interest in the development of the International Law of War and Neutrality. Public opinion has greater influence in determining changes in this branch of jurisprudence than in any other, because these changes depend finally on the common consent of nations, which is but the expression of the united opinion of the people; and this in turn must be guided by the expositions of jurists. The aim of this book is to formulate, from a study of the chief authorities, the general principles which underlie modern usages, to point out where particular practices are obsolete and violate those principles, and to suggest the lines upon which reform may proceed. It may seem by its title to clash with an elaborate treatise which has recently been written on "War and Commerce" by Mr. Atherley-Jones, but its scope is at once narrower and wider. It avoids as far as possible lengthy historical disquisitions, and it does not seek to trace a path through "the wilderness of single instances." It is more concerned with present usages and tendencies, and it covers the effects of war in all its relations to private property, as well of enemies as of neutrals, and both on land and on sea.

It is clearly differentiated also in scope from the standard treatises on International Law, for it deals exclusively with that part of the law which affects private persons, and aims rather at interesting the student than satisfying the lawyer.

Nevertheless, most of the substance of the Essay is derived from the standard English treatises of Westlake, Hall, Wheaton and Oppenheim. From among the vast number of foreign publicists I selected Nys and Despagnet as my chief guides to Continental theories of war, and I have found the "Droit International" of the one and the "Droit International Public" of the other very suggestive. For the case-law upon the subject I depended in the first instance largely upon Snow's Leading Cases in International Law and on Tudor's Leading Cases in Marine and Mercantile Law, but references are given generally to the original reports. I have made considerable use of American decisions, partly because the history of the United States has given special opportunities for the development of International Law, partly because the American Courts have from the beginning of the national life shown a whole-hearted acceptance of the Law of Nations.

Finally, it is my pleasant duty to thank my teacher and friend, Professor Westlake, for the help he has given me in the publication of this Essay. He instilled my first interest in International Law, and, having shared the adjudication of the Yorke Prize with Lord Justice Romer, he went over my manuscript with me, pointing out the errors which the Examiners had noticed, and making many helpful suggestions; and, lastly, he has done me the further kindness of reading parts of the book in proof.

NORMAN BENTWICH.

Lincoln's Inn,
April, 1907.

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NOTE.—The abbreviation L. Q. R. is used for the Law Quarterly Review.

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THE LAW

OF

Private Property in War on Land and Sea.

CHAPTER I.

HISTORICAL INTRODUCTION.

Sir Henry Maine has pointed out that of the Roman titles "Occupancy" is pre-eminently interesting, on the score of the service it has been made to perform for speculative jurisprudence in furnishing a supposed explanation of the origin of private property. It was an almost universal belief at one time that in the supposed state of nature in which mankind had originally lived, the institution of private property had not existed; but that before the organisation of civil societies it had grown up through natural acquisitions of what hitherto had been res nullius, or "no man's goods." The Roman jurists, who developed the idea of a state of nature which was anterior to civil society, regarded "occupatio" as the chief natural mode of acquisition.[1] As it is briefly put in the Institutes of Justinian: "Quod enim ante nullius est, id naturali ratione occupanti conceditur." Among the kinds of res nullius to be appropriated by occupatio, which Justinian goes on to mention, is the property of enemies. "Item ea quæ ex hostibus capimus jure gentium statim nostra fiunt." Sir Frederick Pollock has brought forward evidence that this proposition referred specially to moveable property found in Roman territory, and not to captures of realty made in the country of the enemy; but it is certain that things captured

[1] Just. Instit. II, 12.

in war generally were held to give a pre-eminently good title even where occupatio did not apply. "Maxime sua esse credebant quæ ex hostibus cepissent,"[1] says Gaius.

The theory of the later jurists, however, was of small practical import, for at the time that it was evolved the Romans were rulers of all the civilised world. While they had been building up their empire, they had set no limits to their rapacity, their maxim being that war must furnish the means of war (bellum alit bellum). Their provincial governors, when their finances were straitened, not infrequently made war in order to enrich themselves. Save for a few political thinkers who devised counsels of perfection, which were not followed, the ancient world knew of no restraint in the violence of war.

Conquest in the same way implied to the Greeks and Romans the complete appropriation by the conqueror of all the private property of the conquered subjects. Grotius quotes the statements of the chief classical authors, beginning with Xenophon, who, in the Cyropædia, says: "There is an eternal law among mankind, that when a city of the enemy is conquered all the property therein belongs to the captors."[2] Plato, Aeschines, Plutarch, Cicero and Livy are cited to the same effect. The Romans, indeed, made a distinction between hostile property taken from the enemy on his own soil and that taken within Roman territory. To the latter alone they applied the rule of occupatio by individuals: "Quæ res hostiles apud nos sunt non publicæ sed occupantium fiunt."[3] The former became, in the first place, the property of the State, and was afterwards either let out by it to its original owners at a fixed rent, or sold, or granted to individual citizens of Rome. The general principle, however, was maintained in both cases that all the private property of the enemy subjects as well as of the enemy States was forfeited by war; and that conquest or surrender, unless special conditions were made, reduced the people to the condition of slaves and transferred their property bodily to the victorious State. Livy quotes the early Roman formula of surrender

[1] Gaius Instit. 1. 4, 16.

[2] Grotius De Jure Belli, III. 6, 13.

[3] Dig. 41. 1, 5.

thus: "Deditisne vos populumque urbemque, agros aquam terminos, delubra, utensilia, divina humanaque omnia in meam populique Romani dicionem?" "Dedimus." "At ego recipio." The Roman soldier, when he surveyed his broad acres, which he held by right of conquest, tilled by the serfs whom he had conquered, might well have exclaimed: "My strong arm has gained for me all this wealth."

The barbarian peoples who overthrew the Roman Empire maintained alike the practices of the old Roman soldiery and the theories of the imperial jurists. They regarded war as the natural means for securing property and wealth, ravaged and laid waste the country of the enemy, pillaged any city which they took after storm or siege, and demanded a heavy ransom from those which surrendered. So far as theory at all affected practice, it was considered that by the outbreak of war mankind returned to the state of nature, that the private property of enemies fell into abeyance, and that the natural modes of acquisition revived between belligerents. War was begun by "diffidatio," a severing of the tie of faith between the belligerent sovereigns; and thereafter the subjects of either side were empowered "courir sus aux ennemis," *i.e.*, to spoil and harry the foe. In practice, as well as in theory, there was often "Bellum omnium contra omnes." The combatants in particular were invested with the right of "encha," or compensation, which is explained in the famous Castilian Code of the thirteenth century, "Siete Partidas." Each soldier could recompense himself for any physical suffering or any actual loss in war by seizing a certain amount of plunder, and to this end a fixed tariff of wounds was drawn up.

Not only any corporeal property of an enemy which could be seized by land or sea, but also incorporeal rights, such as debts, were straightway confiscated upon the outbreak of war. There was supposed to be complete solidarity between all the subjects of the same prince, so that they were each liable to any member of another State for any wrongdoing. In a few cases more enlightened ideas were entertained. Thus by the English "Great Charter" (1215)[1] it was laid down that the

[1] Cf. Taswell-Langmead's Constitutional History of England, p. 108.

property of enemy merchants resident in England should not be confiscated at the outbreak of war except by way of reprisals for the confiscation of English property in their State. The growth of a common mercantile law between States encouraged milder usages in Western Europe. But leniency was the exception in the wars—often virtually private wars—between feudal lords, which went on unceasingly during the early Middle Ages.

At sea, indeed, we can trace from the twelfth century the rudiments of a law which regulated the practice of war in relation to the enemy's property. Up to this time the custom had been to allow private captains who deemed themselves wronged "currere supra malefactorem donec plenarie fuerit emendatum."[1] This license was termed special reprisals; when the sovereign power or the State considered itself an injured party and seized, by embargo or otherwise, enemy vessels, it employed what was called general reprisals. These have endured in a modified form to our own time. In the early history of European nations sovereigns had no naval forces of their own, and for this reason they licensed private captains to destroy enemy commerce or capture it. The license inevitably affected the innocent property of neutrals which was mixed up with enemy property, and during war piracy reigned practically without check. The first effective protests against this scourge were made by the important mercantile cities of the Mediterranean. The maritime codes of the twelfth century, the Consolato del Mare and the Laws of Oleron, became the basis of a European customary maritime law, which held sway as well in war as in peace. They allowed the capture of the enemy's property on neutral ships and of an enemy vessel carrying neutral cargo; but they made proper provision for the neutral property and for freight in each case, and Courts were established to try disputed cases.

Maritime war, owing to conditions of space, is bound to affect the rights of neutrals more than land war, and it was much earlier found necessary to regulate it and introduce some kind of judicial control over capture. Special Prize Courts, the first

[1] Cf. Siete Partidas, quoted by Nys.

Courts where anything in the nature of international law was administered, date from the thirteenth century. Richard I. is said to have introduced some of the customs of the Consolato del Mare into England after his return from the Crusades, but until the reign of Edward III.—and, it may be, later—questions of prize, etc. were dealt with by the Common Law Courts or the Chancellor in the form of "causæ spolii." Piracy, reprisals, and letters of marque were, according to Hale, "the most noble and eminent piece of the Chancellor's jurisdiction." Letters of marque or royal licenses to privateers to prey upon enemy commerce were introduced into naval warfare about the same time as the customary laws of capture, and were originally an additional element of order devised in the interests of the sovereign. Only vessels which had the royal license were privileged to capture, or at least to take the profits of capture; and they had to resign a portion of their gains to the king, and to have their captures adjudicated by his Courts.

Belligerent rights may be maintained in their stringency longer upon the sea than on land, but they have always been more subject to order on that element. For the sea is the highway of commerce of all nations, belligerent and neutral alike; and before respect for the property of enemies had been established, sovereigns found it necessary to regulate capture juridically in order not to irritate neutrals. The laws of maritime capture were part of the mercantile law or "law merchant," which was administered in all the civilised countries of Europe. Though the incidents differed in each war, certain broad principles became fixed, so that even in war time it was partially true that "Maritime law was not the law of a particular country but the general law of nations."[1]

On land progress was slower because there was less opportunity for the influence of common consent, and because the institution of private property was not fully established. The supreme lord's right of eminent domain was widely enforced in

[1] Per Lord Mansfield in Luke *v.* Lyde, 2 Burr. 882; cf. the dictum of the U. S. Supreme Court in 1771: "The law of the sea rests upon the common consent of civilised communities." (The Scotia, 4 Wallace, 170.)

war-time, and in case of need he could commit any destruction he pleased upon the property of his own individual subject, while his enemy "jure belli" could do the same. Private property was molested equally by the belligerent enemy and by the national sovereign, and the regard which the latter paid to the rights of his subjects affords some measure of the respect which could be expected from an enemy. As late as 1633 the rights of the King of England in time of war were stated by the advocate of Hampden in the case of ship-money as follows[1]:— "I shall admit not only his Majesty, but likewise every man that hath power in his hands may take the goods of any within the realm, pull down their houses or burn their corn; to cut off victuals from the enemy and to do all other things that conduce to the safety of the kingdom without respect to any man's property." The rights of offence balanced the rights of defence, and between the two private property had no protection in time of war.

As nations became more settled and private war was gradually abolished, the conception of private property became more fixed. Protests were raised against the prevailing outrages of war, which, especially in the fierce religious wars that followed the Reformation, involved the utter negation of law and the extreme of savagery. Grotius was the first to make an effective attack upon the practice of indiscriminate plunder and confiscation, when he declared it to be contrary to the "Law of Nature," and proved the existence and efficacy of such a law to the satisfaction of his contemporaries. During the Dark and Middle Ages the belief in the law of nature had not died out, but it had become clouded and confused. It had been identified with the actual practice of nations, which was in effect unrestrained violence and cruelty. Grotius reformed this view, and revived the idea of a law of nature which should regulate the conduct of mankind when released from national law and acting again in a state of nature. His age demanded ancient authority for all reform, and Grotius found the necessary sanction of his principles in ancient literature, beginning with the Bible. In the

[1] Cf. 3 State Trials, 828.

writings of the world's greatest thinkers, he urged, there appeared a law of nature which prescribed certain restrictions to the cruelties of warfare and to the complete denial of the rights of private property which war and conquest were supposed to produce. He distinguished between the "jus gentium" and the "jus naturæ." Thus he admitted that the practice of nations permitted the capture of all the property of enemies, but the law of nature[1] only admitted the taking of so much as would satisfy the just grievances or the actual damages of the belligerent; and he set forth a number of "temperamenta," or corrections based upon humaner ideas, which he proposed to introduce into existing usage. His work was really an appeal to natural reason to check the violent passions of combatants.

Grotius, except that he neglected the law of neutrality, produced a fairly complete body of international law at the moment when the international society for which it was to serve was assuming a stable form. From the time of the Peace of Westphalia it may be said that a continually developing series of rules, dependent for their authority on custom and the common consent of nations, has regulated the actions of European States to one another in war as well as in peace. The rules of war on land have not been administered in any court or possessed any other coercive sanction, but none the less they have continuously modified practice in the direction of humanity. The usages of war at sea, on the other hand, during the seventeenth and eighteenth centuries received the form of positive law, as the decisions of Prize Courts in each nation, defining the rights of maritime capture over the property of belligerents and neutrals, were reported and collected.

The immediate practical effect of Grotius' work, "De Jure Belli et Pacis," was remarkable. In the war of the Palatinate—which was fought while it was being written—pillage and spoliation were carried to their extreme. Mansfeld, Brunswick and Wallenstein vied with one another in their excesses, and they all supported their armies on robbery of the countryside. Gustavus Adolphus of Sweden, however, who was

[1] Cf. Grotius De Jure Belli, III. vi. 1.

an enthusiastic admirer of Grotius, made his soldiers pay for everything they took, and organised a regular commissariat. His remarkable military successes proved that the old practice was as demoralising for the spoiler as it was ruinous for the spoiled; and in the War of the Spanish Succession, at the beginning of the eighteenth century, non-combatants were largely able to carry on their peaceful pursuits without fear of plunder and rapine, and the armies refrained from ravaging the country save in cases of military necessity, and from the destruction of towns surrendered after a siege. The old custom of pillage, however, was still retained where a besieged town was taken after having been stormed; but this was by way of penalty for obstinacy. The immoveable property of private persons was for the most part not interfered with, and it became unusual to seize the moveable property of domiciled enemies on land or to confiscate the debts of enemy subjects. Bynkershoek, who maintained the old doctrine of confiscation, added that it was relaxed in practice: "Utilitas fere jus belli, quod ad commercium attinet, subegit."

Upon one point, indeed, a fixed usage was set up by the middle of the eighteenth century which showed a peculiar regard for certain private property of enemy subjects. The Silesian loan controversy[1] between England and Prussia in 1752 decided that a sovereign cannot confiscate in time of war the shares of the public debt of his State held by foreign creditors. The case itself did not turn upon the rights of enemy creditors, but the principle that these were indefeasible by war was laid down by the English advocates, and has not been challenged. It is based, not so much on any theoretical inviolability of public faith, as on the fact that, were any confiscation countenanced, it would be impossible for States to raise loans upon reasonable terms in foreign countries. This indulgence was therefore imperatively called for by the interests of the public credit, and has added vastly to the security of investments in national stock. Not only can the loan not be confiscated, but interest is paid on it during the war. A decision of Lord Ellenborough, in the case of Woolf *v.* Oxholm[2]

[1] Cf. Snow, p. 268.

[2] Snow, p. 268; 6 M. & S. 92.

(1817), declared that this immunity was extended by the law of nations to private debts, and that their confiscation by the Danes during the war with England was in conflict with the usage of nations. Although, however, opinion was tending in this direction, England still herself preserved the old custom of embargo and seized any craft of her enemies in her ports, and could hardly, in equity, require them to abandon an analogous right. There was no good reason to distinguish between the confiscation of debts and of other property of the enemy found in the country at the outbreak of war; and it was the exercise of the latter usage by England which had led to reprisals by Denmark in 1807 against the debts payable to Englishmen from her subjects. Lord Ellenborough's decision was therefore premature, but the practice which he had declared illegal at the beginning of the century did in fact become obsolete during its course; and it was held in Hanger *v.* Abbott[1] "that while in strictness it may still be said to exist, it may well be considered as a bare and impolitic right, condemned by the enlightened conscience of modern times."

In the case of contract debts between enemy subjects the remedy is now only suspended during the war, and revives on the return of peace. Immunity, too, is granted to enemy property on land found within the State of the other belligerent. Since the end of the Napoleonic wars there has been only one case of confiscation, which was supplied by the Confederate States in the American Civil War. Their Government passed an Act in August, 1861, which declared "that property of whatever nature, except public stocks, held by an alien enemy since May, 1861, shall be sequestrated and appropriated." This action was reprobated by European opinion, and Lord Russell protested against it on behalf of Englishmen domiciled in the States.

During the eighteenth century the idea was gaining ground that the private property of enemies in the land of the other belligerent was not to be wantonly confiscated. At the same time, however, little regard was paid to property at the sphere

[1] This was a case in the Supreme Court of the U. S. A., 1867, arising out of the Civil War. 6 Wall. 532.

of operations. The indiscriminate ravaging and pillage, which had been the rule before Grotius, had indeed disappeared, but it had been replaced by a systematic and organised plunder, which was hardly less oppressive upon private property. By means of requisitions and contributions, a means was found of making war pay itself, and of destroying the wealth of the enemy without demoralising the army and driving the people to despair. The introduction of the system of requisitions has been attributed to George Washington, but Professor Nys[1] has shown that he unwillingly resorted to a system, which was already common on the continent of Europe, at the peremptory bidding of Congress, and at a moment of urgent need, when the State was bankrupt and the army starving. The kings of France and Louvois, the minister of Louis XIV., were the real organisers of this systematic spoliation, which has left its traces upon the laws of war up to our own day. They supplied their armies by the provisions which they requisitioned from the country, and they replenished their treasury by the contributions which they levied from conquered cities. According to Albert Sorel, war was "un moyen d'alimenter le trésor et de pourvoir aux guerres futures; et l'extraordinaire des guerres était une des ressources les plus sûres des financiers du temps." England paid her sailors largely by the proceeds of maritime capture. France supported her armies by her demands from the towns of the invaded country, and had a surplus left. Requisitions comprised not only objects necessary for the army, but everything which was of any use whatever; so that they were nearly tantamount to the appropriation of all the moveable property of the enemy.

Until the end of the eighteenth century the common opinion held that one of the aims of war was to enrich the State and impoverish the enemy by despoiling his individual subjects. The French Revolution brought into prominence again the idea of natural law and a state of nature, and asserted throughout Europe the rights of the individual man against the powers of government. This great change in thought brought with it a

[1] Revue du Droit International, 1906.

new conception of the proper purpose of belligerents. In the widespread awakening of the human race, and in the questioning of all law and all existing ideas, a new theory of the relation of war and conquest to private property was enunciated. Its basis has remained to the present day, while its full development has not yet been achieved in practice. The change is foreshadowed in Montesquieu's Esprit des Lois, but it received its most emphatic utterance in the works of Rousseau. In a famous passage in the "Contrat Social" he wrote : " War is not a relation of man to man, but of State to State, in which individuals are enemies only accidentally, not as men nor even as citizens but as soldiers; not as members of their country but as its defenders." It is easy to point out the crudeness and a certain confusion of mind which this passage shows. For a State consists only of its individual citizens, and when one State attacks another the individuals of one must attack the individuals of the other. Nevertheless, Rousseau's root idea that belligerents should primarily attack only State property and do the least possible harm to private property, which is consistent with military necessity, is the foundation of the modern law of war.

The Revolutionary Government of France showed at first a desire to give practical effect to the new humanitarian outlook of theorists. When war was threatening with England in 1790, the following rules were proposed as part of a code of war in the National Assembly :—

(1.) " Que l'assemblée nationale regarde l'universalité du genre humain comme ne formant qu'une seule et même société dont l'objet est la paix et le bonheur de tous ses membres.

(2.) " Que dans cette grande société générale les peuples et les états considérés comme individus jouissent des mêmes droits naturels . . . que les individuels des sociétés particulières.

(3.) " Par conséquent nul peuple n'a droit d'envahir la propriété d'un autre peuple."

These ideas were more advanced than any hitherto put forward by the great publicists, and though ahead of general

opinion they marked the way along which it was tending. Again in 1793, in a proposed "Déclaration du droit des Gens," introduced by L'Abbé Grégoire to correspond to the "Rights of Man," we find among the four articles the following:—"Les peuples sont entre eux dans l'état de la nature: ils ont pour lien la loi universelle. Les peuples doivent en paix se faire le plus de bien, et en guerre *le moins de mal possible*." It is true that these ideas[1] were for a long time mere theories which were travestied in action, but their utterance marks the beginning of a change of feeling which in the nineteenth century has had far-reaching effects on practice. We may take it that the general principle which governs modern usage is to eliminate all wanton violence and damage from war, and to restrict the passions of greed and cruelty in belligerents. The French Revolution heralds and ushers in the democratic age in Europe, and the democratic principle in war is to pay regard to the private property of the peaceful inhabitants. The absolute monarchs who went to war to enrich themselves maintained spoliation. The sovereign peoples regard peace as the normal and desirable condition of mankind, and only resort to war to secure some great national end, which is not furthered by seizures of private wealth. Hence, very largely, have arisen the humanitarian spirit in warfare and the mitigation of belligerent rights.

An expression of modern theory, which shows the ideas of Rousseau in a more reasonable form, is to be found in the United States Instructions to their Armies in the Field, Articles 20—22, which are as follows:—

(20) Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilised existence that man lives in political societies forming organised units called States or nations, whose constituents bear, enjoy, and suffer, advance and retrograde, together in peace and in war.

(21) The citizen or native of a hostile country is thus an enemy as one of the constituents of the hostile State, and as such is subjected to the hardships of war.

[1] These proposed articles were based upon theories which Montesquieu had set forth in his "Esprit des Lois."

(22) Nevertheless, as civilisation has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the country itself with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person and property as much as the exigencies of war will admit.

The Crimean War illustrated the new attitude of belligerents to one another's property; and in the last year of the nineteenth century the floating theories were transformed into a positive code which has as its leading conception that the property of belligerents is immune on land, except in so far as military necessity disturbs it.

The history of war on sea does not show the same progress in the seventeenth and eighteenth centuries as the history of war on land, nor a corresponding reform in the nineteenth. Throughout the former period the right of capturing enemy vessels and enemy cargo was maintained in almost all its severity. The Dutch, indeed, in the seventeenth century varied the time-honoured and logical usage of the "Consolato Del Mare," which confiscated enemy goods on neutral vessels and let free neutral goods on enemy vessels, by an illogical principle expressed in the jingle of "free ships, free goods·" "enemy ships, enemy goods." In reparation for their infringement of neutral rights in the one case, they relaxed their severity to belligerents in the other. Their purpose was to protect their own carrying trade, and they called in a high-sounding principle of "vis attractiva," by which the nature of the ship was supposed to infect the goods, to give a legal colour to their self-seeking innovation. They were followed by France, Spain, Portugal and Sweden, though none of these powers held firmly to any rule; and England, though as part of her law she kept the old rule, admitted the new principle, "free ships, free goods," in numerous treaties with Continental powers, starting with that made between the King of Portugal and Oliver Cromwell in 1654. It was the almost invariable rule of our amicable relations with France from 1677 to 1793, and it was accepted by all the

parties to the treaties of Ryswick and Utrecht. Nevertheless, the theory of the great maritime powers as expressed in treaties was at variance with their practice during war. Here we have an instance of what must qualify the whole division of international law with which we are dealing, viz., that "during peace men's minds conform to what ought to be the rule of international law, but in war passion, hatred and seeming necessity are apt to determine the actions of powerful belligerents who set at defiance the best established rules of war."[1]

This contrast between professions and actions was particularly true until the middle of last century; and the rules which appear in the text books of Grotius, Wolf, and Vattel were less a guide to practice than a stimulus to the reforming statesman. Despite treaties and professions, all nations habitually confiscated enemy property at sea whenever they found it, and, so far from letting the neutral flag exonerate the goods, often made enemy merchandise inculpate the unoffending ship according to the hard ruling of the French ordinances of the seventeenth century.

The theorists of the French Revolution proposed the abolition of the capture of private property on sea as well as on land, and under the enlightened guidance of Benjamin Franklin, the United States almost from the beginning of their independence agitated for this reform. But these ideas failed to produce any change in practice, not only in the Napoleonic wars, when belligerent rights of self-preservation were stretched to the utmost, but in the reforming age which followed them, when the usages of land war were largely modified. Sailors are habitually conservative, and the usages of the sea, moreover, are difficult to change, because they pass into law administered by the Civil Courts, the most conservative of institutions. When the Crimean War broke out, the old practices of maritime war towards belligerents were still unchallenged, including embargo, *i.e.*, the seizure of all enemy vessels found at the outbreak of war, or even at the threatened outbreak of war, as Droits of the Admiralty. Dr. Lushington, in 1854, in condemning the Russian-owned ship

[1] Sir Wm. Molesworth, quoted in Macqueen's Report of House of Commons Debate on the Declaration of Paris, July 4th, 1854.

"Johanna Emilie," said: "With regard to any property of the enemy coming to any part of the kingdom or being found there being seizable, I confess I am astonished that doubt should exist on the subject."[1]

The alliance of England and France led indeed to one great correction of existing practices. France had the rule of "free ships, free goods," England the rule that neutral goods on enemy ships were free. These two complementary mitigations were continued provisionally, and after the war received legislative validity by the Declaration of Paris, which opens the modern history of maritime war in relation to private property. The other great reform of the Declaration was the abolition by the European powers of privateers. During the last two centuries, as the naval forces of the State became more important, the use of privateers had diminished, and it was practically discontinued after the Napoleonic wars.

It has been argued that the abolition of privateering should be the prelude to a more thorough reform of maritime warfare, and that the capture of private property other than contraband should be entirely abolished. The United States Government has urged this view repeatedly during the last century, and a movement in its favour has gained continuously in support. England to-day is almost the sole great naval power which opposes the change. Her opposition, of course, is of commanding importance, and the arguments in favour of the existing practice are set out in a later chapter. But this agitation shows that the conception of war which originated with the thinkers of the French Revolution period is steadily gaining ground.

[1] Spinks' Prize Cases, p. 14.

CHAPTER II.

THE SANCTION OF THE LAW.

The progress of the international law of war has been towards a more thorough recognition of the rights of private property in the violent relations of States. Originally there was abeyance, then suspension, then systematised forfeiture, leading to forfeiture only in cases of military necessity; and to-day publicists are advocating, and statesmen granting, compensation in cases where military necessity has caused interference. It is important, also, to notice that rules which were originally unwritten customs, more honoured in the breach than the observance, and were gradually developed in the books of jurists, are now being embodied in formal conventions to which are attached the sanctions of the most solemn international treaties. The laws of war on land were codified at the first Hague Conference, and there is every prospect that at the next the laws of war on sea will be similarly standardised. And the laws of war on sea, be it remembered, include the rights of neutrals.

If we turn from the substantive part of international law, which declares what are the rights that exist in the dealings of States, to the adjective part, which shows how those rights are enforced, we do not find the same progress in the last three centuries. No law, it has been said, is certain, and the law of nations is the least certain branch of all law, and the law of war is the least certain part of the law of nations. International law is for the most part to-day, as it was in the time of Grotius, a body of customary rules, and its sanctions are moral and indeterminate. Rousseau declared that in default of a coercive sanction the laws of war were chimeras, weaker even than the law of nature. Like most of Rousseau's statements, that is an exaggeration, but nevertheless it contains a measure of truth.

One great part of the international law of war, the law of maritime capture, is indeed administered by regular Courts and incorporated into the law of the land, not as local but as international law. In the words of Lord Stowell:[1] "The seat of judicial authority is locally here in the belligerent country according to the known law and practice of nations, but the law itself has no locality. It is the duty of the judge sitting in an Admiralty Court not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out without distinction to independent States, some happening to be neutral and some belligerent." This view is, to some extent, an ideal presentation of the fact, for the law is not in fact always administered impartially in Prize Courts. So long as the tribunal which has to decide upon the rights of neutrals and enemies is the national Court of one of the belligerents, the guiding juridical principle that "nobody can be a judge in his own cause" is violated. And the violation of the principle too frequently involves injustice towards the individual. The honour of nations is not safely entrusted to all Prize Courts. As one of the latest Royal Commissions reported, with the memory of the Vladivostock Court decisions fresh in its mind:[2] "There is no absolute guarantee behind international law to insure that its rules will be enforced." War, too, is apt to blunt the moral sense of the judges of a belligerent nation as well as of the combatants, so that the fine aspirations of Lord Stowell in the case from which we have already quoted, "that a Prize Court sitting in England should administer the law of nations in exactly the same way as if it were sitting in Stockholm," is not realised in practice.

An International Court of Appeal on prize cases sitting at the Hague would certainly seem to be one of the most pressing needs of international jurisprudence, and seeing that the questions it would have to decide would be purely legal, it cannot be objected that it would be derogatory to the sovereignty of

[1] The Maria, 1 C. Rob. 350.

[2] Report of Royal Commission on Food Supply in Times of War.

States. Not only would it tend to greater justice to neutral traders, but it would help the progressive development of international maritime law to meet changing views and changing circumstances. Upon the vexed questions of conditional contraband and continuous voyages, it would be able to lay down rules which would be binding. As things are at present, we have a one-sided development of the law by a belligerent in his own interest, while the claims of neutrals are seldom effectively voiced till the war is over and the damage of unjust decisions has been done. When finally heard, they come through the despatches of ambassadors or the books of publicists, which cannot carry the same weight as the decisions of a Court; and in the result they have to be reasserted afresh at the end of each war. Prize law, in fact, owing to the nature of the Court which administers it, lags behind opinion, and each belligerent nation endeavours during war to resist the reforms in maritime capture it had approved and advocated as neutral, or stretches in its need rights which before and after war it endeavours to limit.

The laws of war which regulate the relations of belligerents to enemy private property on land have a still weaker sanction; for they are applied by martial authority at the seat of fighting, and depend upon the honour of nations and conventional understanding. But these are weakest when a nation is struggling for self-preservation, and are continually liable to be overridden by the plea of "force majeure." It is of the very nature of war to suspend the sanctity of law between the belligerents and to loosen its hold; and the fierce passion aroused by fighting cannot be restrained adequately by rules which frequently appear to conflict with a "necessity" of which the pleader is the judge. "Inter arma leges silent" is a maxim still largely true. Hence the theoretical inviolability of private property on land is circumvented on the Continent by a liberal interpretation of the necessities of war, and the German Staff-rules actually recognise and give legal validity to a number of harsh practices under the title of Kriegsmanier, which temper, or rather whittle away the law of nations (Kriegsraison) on the ground that military necessity brooks no restraint. Continental writers

frequently indulge in fine theories about the philosophical or ideal law of nations, but their ideal is as intangible as the old "Law of Nature" of the Middle Ages, and has not, perhaps, as much weight upon opinion. The laws of war upon land have been codified, but they have not yet been put to a severe test, for the circumstances of the only war fought under them, the Russo-Japanese war, did not give an opportunity for the infringement of the rights of the private property of belligerents. But while the spirit of war survives violence towards property must endure. And when nations have adopted a complete respect for their enemies' possessions, they will no longer be willing to kill their enemies' soldiers, and we shall have reached the days of compulsory international arbitration and "the Federation of the World." So long as nations let slip the dogs of war there must be havoc.

The law of conquest varies in the effectiveness of its sanction according as it relates, on the one hand, to the rights of neutrals in the conquered country or to conquered subjects of a province whose original State still preserves its sovereign power, and, on the other, to the rights of subjects of a State whose sovereignty is extinguished. In the first two cases the general opinion of nations and the pressure of external Governments is able to secure respect for the progressive usages of nations; in the last case the treatment depends upon the unilateral will of the conqueror, and the sanctity of private property is apt to depend upon his interest. Certain recent English decisions in this regard are particularly interesting and deserving of special notice, because they raise the whole question of the bindingness of international law. The English prize law is perhaps the most remarkable and admirable body of case-law which the history of international jurisprudence has to show; and the English military authorities have continuously treated the private property of enemies with a strict observance of the laws of war, and have even shown a regard for it beyond what is demanded by them. But the English Courts, in several decisions arising out of the Transvaal war, have taken up an attitude upon the rights of conquest which involves not only a disregard

of the rights of private property, but also a disregard of the place of international law in the law of the land.

The law applied by the conqueror to his new subjects is naturally his own municipal law; for once his conquest is complete he is dealing with members of his own State. But he stands in a peculiar position to them. It is in his option to apply the general rule of law to them only from the time that he actually perfected his title, *i.e.*, from the date of peace or the extinction of his predecessor; or, on the other hand, frankly accepting the idea of State succession, to recognise the obligations handed down to him by the former sovereign power in the conquered country. Now international jurists of to-day have almost unanimously agreed that conquest implies a State-succession which is analogous to the succession of individuals, and involves corresponding rights and duties. And foreign Governments, notably the Government of Italy, have given legal effect to this idea by their conduct to conquered provinces. They accept the common consent of nations, expressed by its jurists and evidenced by treaties, conventions, etc., as binding upon them and as authority for their Courts. In the United States, again, the law of nations is, by an article of the Constitution, part of the law of the land, and municipal law is to be interpreted in relation to it. In England, however, an opposite doctrine has held, and continues to hold, force. International law, as such, has no binding force and is not part of the common law, but is regarded as mere opinion; only when its rules are embodied in some statute or treaty need it be regarded by the Courts, and in interpreting existing statutes or acts of the executive they are not to be influenced by it.

This attitude is exemplified in the two recent cases of Cook *v.* Sprigg and West Rand Central Mines Co. *v.* Rex.[1] In both the question was whether the Courts had power to adjudicate upon an act of State-succession which violated rights of private property. The former case dealt with cession and not conquest, but the principles involved are the same, and the judges declared there in wide terms: "It is no answer to the

[1] (1899) A. C. 572; (1905) 2 K. B. 391.

plea of Act of State to say that by the ordinary principles of international law private property is respected by the sovereign who accepts the cession and assumes the legal duties and obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is, that according to the well understood rules of international law, a change of sovereignty by conquest ought not to affect private property; but no municipal tribunal has authority to enforce such an obligation." As Professor Westlake has remarked, that is a statement that one would rather have expressed otherwise; and Sir Frederick Pollock has said of this decision that it implies that "there is no rule or presumption that private property is to be respected in cases of annexation, of which any Court must or indeed can take notice."[1] And this corollary is clearly in opposition to the current law of nations.

In the case of the West Rand Central Mines Co. *v.* Rex, which was tried in 1905, the Divisional Court upheld this interpretation of an Act of State, and Alverstone, C. J., went on to question the bindingness of international law in our municipal Courts. Further, he entirely neglected the gradual progress of international usage, for he quoted with approval an opinion of the Privy Council given in 1722: "When the king of England conquers a country it is a different consideration; for then the conqueror, by saving the lives of the people, gains a right and a property in such people, in consequence of which he may impose upon them what law he pleases." Now these doctrines may have been very admirable in the eighteenth century, but it is as reasonable to quote them to-day for the conqueror's rights over the subject's property as it would be to quote the old Roman law of conquest. The English judges tend to neglect the development of international law in the last century which has revolutionised the laws of conquest and war in regard to their effect upon private rights and private property. The plea of "an Act of State," which they call in to bar the appeal of the conquered subject, becomes in this way a device to enable the

[1] Cf. Pollock on Torts, 7th ed. 108, 109; L. Q. R. Vol. XVI. pp. 1, 2.

English sovereign to evade his international obligations towards the subjects of an extinguished State.

An Act of State was defined by Fitzjames Stephen as "An act injurious to the person or property of some person who is not at the time of that act a subject of His Majesty, which act is done by any representative of His Majesty's authority, civil or military, and is either previously sanctioned or subsequently ratified by His Majesty."[1] This prerogative of the Crown has been applied to mean that persons who by an act of State, *e.g.*, annexation or State succession, become British subjects, are not entitled to complain in a British municipal Court of anything incident to such action.[2] Such an interpretation has as its effect that the Crown in dealing with a conquered or ceded territory holds a position which is the exact reverse of its constitutional powers at home. In the one case it is placed completely above the law, while in the British Isles it is completely subject to the law of the land. And the interpretation appears to be based on a misconception. It is true that no subject can challenge the act of State itself, *e.g.*, the act of annexation. But if that act carries by international law certain consequences, surely the subject has the right to appeal to the honour of the sovereign that these consequences be not disregarded; and the municipal Court may give effect to the international obligation. And if modern international law lays down that annexation is not to interfere with the rights of private property, then surely the conquered subject must be able to get redress from some Court when his rights of private property are violated. "Where there is a wrong there is a remedy," is one of the guiding principles of our law, and if the subject is debarred from challenging the incidents of an act of State in the ordinary municipal Courts, it would seem desirable to create some new jurisdiction of the Crown, perhaps a new committee of the Privy Council, which could grant him

[1] Cf. Stephen's History of Criminal Law.

[2] Cf. Doss *v.* Secretary of State of India, L. R. 9 Eq. 509; Cook *v.* Sprigg, (1899) A. C. 572; West Rand Central Mines Co. *v.* Rex, L. R. (1905) 2 K. B. 391.

his just and proper redress from "the fountain of English justice."

The present attitude of the English Courts seems to betray another trace of the lingering prejudice of which our jurists have never entirely rid themselves since the old days of Austin: that international law is not really law at all. The words of Lord Alverstone reflected the temper of Lord Salisbury, who once declared of the law of nations, that "It depends generally upon the prejudice of writers of text-books, it can be enforced by no tribunal, and to apply to it the word 'law' is to some extent misleading."[1] What is particularly unsatisfactory in the conduct of England, is that she in practice acts upon this attitude only in her dealings with the subjects of a conquered State. When the subjects of a neutral State are concerned, who have a powerful Government to support their claims, she has either voluntarily, or on protest, accepted the usages of international law and refrained from interfering with private property. The rights of the conquered are indeed a part of international law most capable of legal definition and most deserving of legal treatment, for when war is over the security of property should at once revive. English Courts might in this matter well follow the practice of the United States, who have always shown a frank acceptance of the limitations imposed upon the rights of the conqueror. In the case of U. S. *v.* Moreno it was said:—"That cession (*i.e.*, of California) did not impair the rights of private property; they were consecrated by the law of nations. . . . The treaty stipulation was but a formal recognition of a pre-existing sanction in the law of nations."[2] An Act of State in England, like an Act of Congress in the United States, according to the celebrated dictum of Marshall, C. J., "ought never to be construed to violate the law of nations if any other possible construction remains."[3]

Professor Westlake has stated concerning the law that should

[1] Quoted in the Encyclopædia of the Laws of England, *s. v.* International Law.

[2] Snow's Cases, pp. 22, 375.

[3] In The Charming Betsy, 2 Cranch, 64.

regulate English action: "English Courts must enforce the rights given by international law as well as those given by the law of the land so far as they fall within their jurisdiction in respect of parties or places; subject to the rules that the king cannot direct or modify private right by treaty, and that the Courts cannot question acts of State." (Cf. Westlake in L. Q. R. January, 1906.) The last proviso of this rule no doubt is necessary to cover the existing practice of the Courts, but a more equitable condition would be that an act of State should not be construed to conflict with international obligations. When an offence has been committed by the sovereign against the law of nations, "act of State" is as bad a plea for him as is "public policy" for a subject when he has broken the strict law of the land. The words which Baron Parke used in a famous case about public policy, and which Lord Halsbury quoted in Driefontein Mines Co. *v.* Janson,[1] apply "mutatis mutandis" to the plea of act of State. "To allow public policy to be a ground of judicial decision would lead to the greatest uncertainty and confusion. It is the province of the judge to expound the law only, the written from the statutes, the unwritten or common law from the decisions of our predecessors and of our existing Courts, and of text-writers of acknowledged authority; and upon principles to be clearly deduced from them by sound reason and just inference."

The backwardness of England in accepting the progressive ideas of the law of nations is doubtless due in part to the very merits of the English legal system. We adhere so loyally to the remarkable body of our case-law, that we are chary of admitting the authority of external jurisprudence. We trust in custom broadening out from precedent to precedent, and to some extent we fall into a certain insularity and offer resistance alike to the principles of natural reason and to the consensus of nations. Wherever international usage is applied through municipal law, the English Courts are excessively conservative and lag behind Continental tribunals. What renders the practice of our Courts so striking is that it contrasts strongly

[1] (1902) A. C. 496; cf. Egerton *v.* Lord Brownlow, 4 H. L. C. 123.

with the progressive views of the military authorities; and not only of the military authorities, but of extraordinary judicial bodies like Royal Commissions. The rules of war on land have now the bindingness of a solemn treaty upon civilised nations; the rules of war on sea will probably soon have the same sanction. The rules of conquest can have no greater bindingness than the regular courts of the land can give to them. But seeing that they have to be applied when the violence of war is over and the rule of law has been reasserted, there is the more reason that they should be honestly accepted and judicially supported. The Rule of law, which characterises the English Constitution, should extend to the relations of the sovereign power with its conquered subjects. It is the paradox of England's present attitude to international law that where it is judicial it is most backward.

CHAPTER III.

WAR AND PRIVATE PROPERTY ON LAND.

During the nineteenth century the theory was continually growing stronger which makes war primarily a relation between States, and therefore leaves the rights of private property intact, except so far as they are disturbed by the necessities of war. This theory found its expression in the laws which were drawn up by the representatives of the Powers at the Hague in 1899, and ratified by their Governments.

Comparing the strife of nations to the litigation of individuals, it may be said that, while of old a nation exacted its damages and costs from the enemy subject as well as from the enemy State, he now claims them only from the latter. But at the same time he may interfere with the goods of the non-combatant subject, when military exigencies demand it.

The principle of modern usage, according to Hall, is that property can be appropriated of which immediate use can be made for warlike operations by the belligerent seizing it, or which, if it reached his enemy, would strengthen the latter either directly or indirectly; but that property not so capable of immediate or direct use, or so capable of strengthening the enemy, is insusceptible of appropriation.[1] Bluntschli puts the same idea more concisely when he says: "Le vainqueur doit respecter la propriété privée, et il ne peut y porter atteinte que lorsque les opérations militaires l'exigent."

We shall see that the practice even of the latest times gives such a wide interpretation of military operations and "immediate use" that the spirit of the principle of exemption is partly violated; nevertheless, it represents an ideal towards which the usage of nations has steadily developed from the Napoleonic

[1] Cf. Hall's International Law, p. 420.

wars, and which has received legal validity in the Hague Code of the Laws of War.

From the middle of the nineteenth century attempts were made to form a code of the laws of war, so that usages should no longer be changeable at the caprice of the belligerent. The Conventions of St. Petersburg and Geneva, and the unratified articles of the Brussels Conference of 1874, represented steps in this direction; and finally the Hague Conference of 1899, premising that "the assembled representatives of the States were animated by a desire to save, even in war, the interests of humanity and the ever increasing requirements of civilization," drew up a code for war on land which, ratified as it is by all the Powers, must be a standard for future conduct, though its only sanction is the honour of nations.

The Institute of International Law in their proposed code of 1880, which was the groundwork of the Hague Code, laid down as its principle that the only legitimate end that a State may have in war is to weaken the military strength of the enemy; and Professor Holland, in his expansion of the Code for the use of British forces, interprets the principle thus: "The object of war is to bring about a complete submission of the enemy with the least possible damage to property."

Nevertheless land war has still very serious effects upon the private property of enemies and of neutrals which is situated permanently in the territory of the enemy. On land the property of neutrals is not treated differently from that of enemies, nor has the neutral any more legal right to compensation for damage done incidentally, for it is not the disposition of the owner but the location of the property which is decisive. Even when the property of domiciled neutrals is taken possession of or destroyed for strategic reasons by either belligerent, compensation need not be paid to the owners for the loss they have sustained. But the property of neutrals temporarily in the country when seized in such circumstances is entitled to compensation. The injuries, however, caused by the events of war, battles, sieges, and bombardments—these are considered as due to necessity and *force majeure*, and akin to the losses caused by acts of God, storms, earthquakes, etc.; and neither belligerent

considers himself liable to compensate the private owners affected. As an act of grace a State may, after peace, consent to compensate its subjects for their losses; by raising taxes or loans to enable it to do this, it disperses equably over the whole nation the loss which had originally ruined the few.

Pillage is now formally prohibited even when a town is taken by storm;[1] but the laws of war still permit an invading army, on the ground of military necessity, to devastate whole tracts of country, burn dwellings, and clear a district of supplies.[2] The famous campaign of General Sherman in 1865 through Georgia is a notable instance of such devastation. A belligerent may employ this extreme measure also when his enemy has ceased regular military operations and obstinately continues a guerilla warfare, as was the case with the bands of the South African Republic after the English proclamation of annexation in September, 1900. Their irregular warfare was met by what has been called the "process of attrition." The devastation of large tracts of country and the systematic destruction of habitations were employed as the only effective means of bringing about the submission of the desperate remnants of what had been the enemy's army. The Hague Laws of War contain no provision for emergencies of this kind. In their preamble it is stated that the provisions are destined to serve as general rules of conduct for belligerents in relation to each other and to the population. "It has not, however, been possible to agree on provisions embracing all circumstances which may occur in practice." Belligerents, therefore, have sometimes to return to the older methods of warfare; with this difference, that their destructive operations must never be wanton or spiteful but must have a clear military justification. Military necessity, however, may have a very wide connotation. According to Lieber, it allows of all destruction of property and obstruction of ways and channels of traffic, travel or communication, and of all withholding of sustenance or means of life from the enemy, or appropriation of whatever an enemy country affords, necessary for the sustenance and safety of an army.

[1] Cf. Hague Laws of War, 28, 47.

[2] Cf. Holland, Laws of War on Land, p. 4.

Until the Hague laws were drawn up, the soldiery preserved the right to take as booty any property which they could capture from the combatant enemy, and the State used to divide the proceeds of such captured goods equally among the army. Now, however, they are prohibited from doing this,[1] so that they may have no taint of fighting for private gain; and all the personal belongings of prisoners of war, except horses and military papers, remain their property.[2] Further protections for private property are provided in the general prohibitions "to destroy or seize the enemy's property unless its destruction and seizure be imperatively demanded by the necessities of war; and to attack or bombard towns, villages, habitations, or buildings which are not defended."[2] This article, of course, does not prejudice the right of the belligerent to destroy buildings for military reasons; and no right to compensation from his own State can be set up in this case by the private owner, as was pointed out by Sir Edward Thornton, the arbitrator in a Commission established by the United States and Mexico in 1868 to settle differences arising out of the war between them.

Wherever armies are present, and more particularly when hostile armies are face to face, the sovereign of the invaded land, as well as the sovereign invading, imposes martial law upon the inhabitants in the place of the law of the land, and applies it to all persons and all property in the district over which it is in force.[3] The ordinary law of the land is thereby suspended, or at least subject to be overruled, by military requirements.

Martial law was well described by the Duke of Wellington as "neither more nor less than the will of the general who commands the army"; and such a law or absence of law involves a disregard of the rights of private property whenever they conflict, or are deemed to conflict, in the slightest degree with military needs. The commander who administers it is subject only to the customs of war.

The rights of the invader are supreme over all rights of

[1] Cf. Hague Laws, 7. [2] Ibid. 23, 25.
[3] Cf. Holland, op. cit. p. 5.

private contract. In the words of the United States army instructions (art. 32), "A victorious army, by the martial power inherent in it, may suspend, change, or abolish the relations which arise from the services due, according to the existing laws of the invaded country, from one citizen subject or native of the same to another." And the army of the invaded country has corresponding powers over the rights of peaceful citizens. When the preservation of the whole State is at stake, the rights of individual members of it must give way.

The State at war may seize or destroy any property whatsoever if necessary, and its officers are the judges of that necessity. Nor, when the war is over, are the actions of the military authorities, however violent, justiciable by the ordinary tribunals. In England this was decided in a case which arose out of the Boer war (Ex parte Marais[1]), which dealt with the liberty of the subject. *A fortiori*, the principle of non-liability will apply to cases of property. Nevertheless, a belligerent sovereign to-day could hardly demand of his own subjects such sacrifices as William the Silent in 1573, when he flooded part of the Netherlands to drive off the Spaniards; or, again, such a devastation as the Tsar Alexander imposed in 1812, when he made his country a desert and fired Moscow for the reception of Napoleon. Vattel held that there should be a limit to the rights of a belligerent Government in this way,[2] and even the plea of imperious necessity would not allow such wholesale destruction of private property to-day.

Certain States retain by statute or the articles of the Constitution a right to commandeer in preparation for war any private property of its subjects which may be of service to it. The Transvaal Constitution included such a right, and the Government applied it in 1900 to quantities of gold belonging to companies registered and working on the land. The Government really forms a contract with the person or corporation from which the property is seized, but it may not be in a position to honour that contract at the end of the war; and its successor

[1] (1902) A. C. 109.

[2] Droit des Gens, Book III. Chap. IX.

may not think itself bound by it, so that a loss will result to private citizens or domiciled neutrals. Similarly, a belligerent Government often levies forced loans of money from its subjects immediately before and during the war, and it enforces payment from resident neutrals as well as from its own subjects. Englishmen residing in the Southern States were much affected by the exactions of the Confederate Government during the war with the Federal States; but Lord Russell refused to interfere on their behalf in cases where they were genuinely settled for purposes of trade. The United States Government itself protested against the usage when it pressed upon its own subjects resident in Peru in 1869. But it seems equitable that domicile should determine the disabilities of neutrals in regard to contributions, just as it does in regard to trade or destruction of property.

Apart from the damage to property induced by the necessities of war and the substitution of civil by martial law, it is further menaced by a survival in a modified form of the old usages of spoliation and confiscation. They pass now under the fairer names of requisitions and contributions, and they apply particularly to territory in military occupation; but the former, at any rate, are imposed also on any territory through which an invading army is marching. The requisitions, contributions and fines of the French kings, and later of Napoleon, represented a systematising of the earlier practices of plunder, and in the course of the last century a more careful limitation of these rights was gradually reached, while, finally, the Hague laws endeavour to confine the appropriation within the limits of military necessity. Still, these practices remain a real, if not a formal, violation of the modern theory of the immunity of private property on land, and they call for stricter regulation than is at present enjoined.

It will be convenient to treat them in relation to the general rights of the military occupant over property, with which they are most frequently associated. The careful distinction between such occupation and conquest is one of the great improvements in modern warfare, and prevents the premature disturbance of property and legal relations which resulted from the old con-

ception that the invader had conquered the territory as soon as he was in occupation of it. To-day conquest does not result until there has been the complete subjugation or extinction of one of the belligerents. A treaty may not always be necessary to perfect the condition; *e.g.*, Lower Burmah was annexed to India without any formal cession; but there must be, *de facto*, a complete subjugation and cessation of resistance. Until this occurs there is only occupation. A territory is held to be occupied when it is placed, as a matter of fact, under the authority of the hostile army which has exclusive possession. The national Government is provisionally driven out, and the invader must set up some authority in its place; and according to the Hague rule, "he shall take all steps in his power to re-establish and ensure as far as possible public order and safety, while respecting, unless absolutely prevented, the laws of the country."[1] This stipulation, which prevents him from interfering with private law as to property or contracts, is supported by another which says that "the private property of individuals must be respected and cannot be confiscated."[2] The duty of the occupier to respect the existing political order in his provisional Government is further marked by the rule which directs the assessment and incidence of taxes and customs to be carried on by the occupant according to existing practice.

The Hague laws, having thus provided for the general security of property, go on, however, to legitimise the imposition of requisitions and contributions by the occupant without requiring payment for them. It may be argued that requisitions, at any rate, are only rights of the sovereign State, exercised provisionally by its substitute in occupation, and even that contributions are only a special war tax, such as either the regular sovereign or his deputy has a right to enforce during hostilities. The hardship upon the subject is that he has often to pay both Governments, the temporary and the permanent, the first in order to supply it with the means of fighting his own country, the second in order to enable it to procure peace.

A requisition is defined by Littré as "la demande faite par

[1] Hague Laws, 43. [2] Ibid. 46.

l'autorité pour avoir à sa disposition des hommes et des choses." Nys quotes a definition of Lewal which is more illuminating of present practice: "Requérir, c'est militairement demander, exiger non à vertu d'un droit mais au nom de l'obligation de vivre." There is in fact no jural foundation to requisitions, but they are justified by that necessity, the instinctive right of self-preservation, which is anterior to, and paramount over, all civil law. And only so far as they are justified in this way are they permitted to the invader by the modern laws of war. The national Government may, of course, by its municipal law have special rights of requisitioning from its citizens which go beyond what is demanded by necessity. In England, indeed, the State has no right to billet soldiers in private houses or demand supplies for them from private owners, though it may do so for a proper (statutory) payment in the case of innkeepers and licensed victuallers. But on the Continent the State maintains wide rights of this character in times of peace in order to provide shelter and food for its vast conscript armies. And these rights it extends in war. The French law of 1877 empowers the French commanders to make requisitions in times of war not only on French soil but also abroad, and prescribes payment or State liability only in the former case. The requisitions which a belligerent makes in the country of its enemy are considered commonly to be a proper burden upon its enemy. But they may not in future, as they have been in the past, be used as an indirect means of spoliation.

Thus, during the Franco-Prussian war, when the practice was most systematically carried out, in spite of their fine proclamations that they made war only on the State and not on the citizens, the Germans organised the whole of Alsace-Lorraine and, in fact, the whole of France as far west as Paris, as a vast requisitioning ground. It has been reckoned that property to the value of 16,000,000*l.* was thus seized. Each commandant had the right of ordering from the inhabitants lodging and the necessary supplies for his army. And the inhabitants had either to meet these specific demands made upon them, or they could redeem the obligation of keeping the soldiers who were billeted proportionately among them for two

francs a day per soldier—a clear proof that it was not only necessity which produced the demands.

The law as it stands now is that—

> "Neither requisitions in kind, nor services, can be demanded from localities or inhabitants except for the needs of the army of occupation. They must be in proportion to the resources of the country, and of such a nature as not to imply any obligation upon the population to take part in military operations against their country. These requisitions shall only be demanded on the authority of the commander in the locality occupied. Supplies in kind shall as far as possible be paid for on the spot; if not, the fact that they have been taken shall be established by receipts."[1]

Unfortunately the terms of this law do not impose very definite limitations upon the actions of commanders. So much depends upon what they consider to be "the needs of the army of occupation." The phrase was substituted for "the necessities of war," which occurred in the rule proposed at Brussels; but it is not much more favourable to the inhabitants. It is difficult in calm deliberation to make a proper differentiation between respect for private property and the necessity of the army; in war it is impossible. Requisitions in kind could not now cover articles of luxury, but they may include any quantity of provisions, vehicles, clothing, tobacco, and horses, and, according to the German staff publication, such seemingly harmless things as printing presses. Colonel Hammer, at Brussels, proposed to allow the invader to demand only such supplies from the population of the occupied country as he could demand from the inhabitants of his own country by his national law. Such a regulation would have honestly met the claims of private property and have brought the law of war into relation with the ordinary law of the land, but it was rejected at Brussels; and in the desire to come to an agreement at any price, it was not pressed at the Hague.

The last part of the Hague law which deals with payment

[1] Hague Law, 52.

for requisitions, loses all its effect by reason of the qualifying "as far as possible." This practically leaves the matter to the discretion of the invader. The receipts given are evidence, indeed, that goods have been exacted, but they do not imply any promise from the occupant to pay at some future time, and a provision to this effect was deliberately rejected at the Hague. The treaty of peace may enact whether the Government of the occupying or of the occupied country shall honour these receipts, or the question may be left open, in which case the owners will depend on the grace of their Government for compensation. In the Transvaal war Lord Roberts issued a proclamation (February, 1900),[1] saying that "Requisitions for food, forage, or shelter made on the authority of officers in command of Her Majesty's troops must be complied with, but everything will be paid for on the spot, prices being regulated by the local market rates. If the inhabitants of any district refuse to comply with this demand, supplies will be taken by force, a full receipt being given." Later, in May, 1900, he announced that "any property that it may be necessary to take will be paid for"; and again (September 14th, 1900), that "the stock of burghers who surrender voluntarily is to be paid for, or a receipt will be given stating the value of it, if it is taken for the use of troops." These proclamations may be taken to represent the most generous treatment of an invading army, and may have been influenced by the determination to annex the occupied territory. But England has always taken a liberal attitude towards the people of the country invaded; witness the conduct of Wellington in Spain and France, 1810—1814.

The more oppressive methods of making requisitions are—

(1.) To take them at a price fixed by the commandant, which may or may not be equal to the value of the article.

(2.) To take them without any payment at all, and to give a receipt which has no binding force upon the requisitioner.

The Hague laws do little to check this last method, which creates the most serious injury to private property. Continental

[1] Cf. Stoerk's Collection des Traités Modernes, Vol. XXXII. p. 137.

generals are likely in the future as in the past to regard requisitions as military necessities which the invader has the right to take, leaving the enemy Government to pay for them, if they choose, when the war is over.

The retention of the system of contributions in the laws of war is a further menace to private property on land. Contributions are defined by Hall as "such payments in money (levied by the occupying army) as exceed the produce of the taxes"; *i.e.*, they are a kind of special war tax levied on localities in the possession of the invader. Continental armies, during the last century, continued the practice of levying large sums upon occupied districts and captured towns, if not to enrich themselves yet at any rate to indemnify themselves for the general expenses of the war. Here, again, the Hague laws recognize the usage but endeavour to limit it, and are, perhaps, more successful than in their treatment of requisitions.

The law is now, that, besides the taxes "the occupant may levy money contributions only for the needs of the army or of the administration of the occupied territory. The contributions must be levied under a written order, and on the responsibility of a commander-in-chief, and shall be regulated by the rules in force for the assessment and incidence of taxes. In every case a receipt is to be given to the payer."[1]

The effect of these provisions, if they are observed, is to restrict contributions to particular military needs. And the limitations seem to be strictly required by the modern conception of war in its relation to private property. The old theory of pillage, either indiscriminate or systematised, as a means of recompensing the army for its toil or enriching the victorious State, has been abandoned. Towns have no more to ransom themselves from spoliation. Private property may be appropriated only by way of military necessity, and this only allows the invader to levy money in one place in order to buy provisions, etc. at another for the subsistence of the army. Contributions, in fact, are only justifiable in lieu of requisitions, and as a means of making the incidence of requisitions equitable. They

[1] Hague Laws, 49—51.

should no longer be demanded from the same place in addition to requisitions, unless it is by way of a fine for some violation by the inhabitants of the laws of war or the order of the occupier. For a belligerent exercises a severe penal law of his own, and where he resorts to retaliation against an unscrupulous opponent or to punishment for offences against his legitimate commands, he has larger rights over private property than are allowed by the normal laws of war. He may no longer "inflict a general penalty, pecuniary or otherwise, on the population on account of violent acts for which it cannot be regarded as collectively responsible."[1] But on the other hand, when the armed forces of the enemy violate the laws of war, or where the non-combatant population in general refuses to obey the proper demands made upon it, the belligerent may on his side apply extraordinary measures to bring them to reason. Lord Roberts accordingly warned the inhabitants of certain districts which he had occupied, that "in the event of their committing any further act of hostility they will be treated, as regards their persons and property, with the utmost rigour."[2] The imposition of fines and the confiscation of private property on land as a penalty for misconduct correspond to the confiscation of enemy property at sea after a belligerent has implicitly forbidden his enemy to trade. The actions in either case are more properly to be classed as forfeiture than as appropriation; and, viewed in this light, they are not inconsistent with the general inviolability of private property. The provision that fines may be only imposed by a commander-in-chief provides some security to the private owner that the right will not be abused.

The imposition of requisitions and contributions by an occupying army within certain limits may be justified not only by historical tradition but by the necessities of the case. Both reasons are almost entirely absent in a proposed extension of the usage to naval squadrons attacking unfortified towns on the sea coast. It is true that the laws of some Continental powers, *e.g.*, France, permit the State to make requisitions of its citizens for its naval as well as for its military forces, and if a belligerent

[1] Hague Laws, 50.

[2] Stoerk, op. cit. p. 140.

fleet were in need of supplies of food, clothing, or coal, it would not be open to objection if it should demand them of the coast towns of its enemy. The risk of being attacked while it was collecting its demands would be sufficient protection against the abuse of such a right. But the proposal that a naval force should have the right to demand money contributions under threat of bombardment can find no justification from the practice of land war. And in view of the published scheme of the French minister, Admiral Aube, in 1882, wherein he proposed that armoured fleets in possession of the sea should "mercilessly hold the coast towns of the enemy to ransom," and of the divulged secret that the Russian fleet at Vladivostock intended in 1878, in the event of war with England, to sail to the undefended Australian ports and lay them under contribution—it is a practice which should be directly prohibited by the Hague Conference when it draws up the laws of war on sea. It practically amounts to the systematisation of pillage, and is directly repugnant to the Hague law forbidding pillage *on land*. It would be a wanton confiscation of private property, and it can find no basis in the necessities of war. The Anglo-Saxon Powers who would have the greatest opportunity of employing such a measure of warfare have shown no disposition to approve of it, and an article inserted by Captain Stockton in the Code of Naval War of the United States, 1900, represents the better opinion on the subject. It prohibits the naval bombardment of an unfortified place, or the threat of it, "except where it is incidental to the destruction of military and naval establishments, or when demands for reasonable requisitions of provisions essential for the navy are forcibly resisted."

In addition to requisitions, which are an indirect appropriation of private property, an occupying belligerent may directly seize moveable private property which is immediately useful for war, and which on sea would be absolute contraband of war. The Hague law runs as follows: "Railway-plant, land telegraphs, telephones, steamers and other ships, apart from cases governed by maritime law, as well as depôts of arms, and generally all kinds of war material, even though belonging to companies or to private persons, are means for conducting

military operations (and may be taken); but they must be restored, and the compensation to be paid for them shall be arranged, on the conclusion of peace." (Rule 53.)

The German rules of war include in this category all objects of locomotion and such things as field glasses and printing presses, so that the effects of an invasion upon the usufruct of private property in this way may be very considerable. According to the text of the Hague laws, "Railway-plant coming from neutral States, whether it be the property of the State, or of companies, or of private persons, shall be sent back to them as soon as possible." (Rule 54.) The protection given by this law is largely reduced by the qualifying words at the end, which practically leave the ancient right of angary undisturbed. "Angary" was the name originally given to the rights of the Roman governor to provide himself and his suite with means of locomotion from the provincials; and in international law it came to be used for the right of the belligerent to seize or destroy for military purposes unoffending neutral property which is temporarily present in the enemy country. The distinction must be carefully kept between the property of domiciled and the property of passing neutrals in the enemy country. The former is regarded as identified with the enemy, and is subject to all the incidents of war without compensation; the latter is regarded as remaining in neutral ownership, is only subject to the exactions which are impelled by necessity, and is entitled to compensation.

Treaties permitting angary were not uncommon at the end of the eighteenth century, and Napoleon transported his army to Egypt in neutral vessels seized in French ports under this right. In the nineteenth century a few treaties with South American States have provided for compensation in case of seizure; between European countries this condition is well understood and has not to be specially stipulated for. An instance of the usage occurred in 1871, when the Germans seized and sank some English colliers at Duclair, on the Seine, to prevent French gunboats steaming up the river to assist Rouen; and Bismarck in that case did not deny the general right of the neutral to indemnification. In spite of the Hague law it may be conjectured that a belligerent would not hesitate to-day on the plea

of military necessity to detain neutral rolling-stock, which was passing through the occupied territory, until the end of war; while recognising his obligation to pay compensation for his user. The only advantage, then, that such neutral private property has over that of belligerents in land war is that it can claim compensation for detention or destruction as of right, while the other only has it of grace, and may not have it at all.

It may be added here that an occupying army can only take possession of cash, funds and realisable securities ("valeurs exigibles") which are substantially and in fact State property. This certainly excludes private deposits in savings banks which are only under State protection, and probably debts or contractual obligations of individuals to the State of which the occupant secures the record. These are personal rights, and should not pass to the temporary sovereign unless he consolidates his position by definite conquest. When this occurs, the conquering sovereign can justify retroactively confiscation which he has made in excess of his proper powers as military occupant.

Seizure in war does not give the belligerent any general legal right of succession to the property of his enemy, but only a right of user based upon grounds of necessity and self-preservation, and it extends only to things which are in *de facto* possession. In this way it is radically different from conquest, which does provide a jural right of succession, so that an occupant who becomes a conqueror succeeds to the incorporeal assets of the dispossessed sovereign. Property divested by an occupant in excess of his rights returns to the original owner, so far as possible, upon the restoration of the old sovereign power, by the so-called law of postliminium. This is a sort of international equity which considers as not done, what should not have been done.

Summing up we may say that the Hague laws of war on land deny the rights of belligerents to seize private property as a profit of war, and permit it only as part of military operations or military necessity. At the same time their recognition of requisitions clearly modifies the inviolability of property which numerous foreign publicists claim to be established on land, and which they contrast with the survival of maritime capture.

CHAPTER IV.

COMPENSATION FOR WAR LOSSES.

Hitherto we have examined the injuries which belligerents are allowed to inflict on private property. In view, however, of modern usage it remains to consider the final incidence of the loss. For the most progressive nations have shown a disposition during the last century not to allow the loss to remain entirely upon the individual originally affected, but to distribute it more equably over the State by a system of national compensation. Though the practice in this direction is only modern, the argument in its favour goes back to the founder of international law. In the seventeenth century Grotius endeavoured to refute the opinion which held that the State need provide no indemnity or compensation in alleviation of the loss of the citizen. He pointed out that the ties of society which bound together the members of a political community, should induce the whole body to bear the burden imposed on a part. Yet he had to admit at the same time that the municipal law of nations did not give the subject a right to claim relief from his sovereign, however much his loss had been incurred on behalf of the State. In fact, his was a bare right of nature or reason, which lacked even the sanction of custom. Vattel, in the next century, drew a careful distinction between the different kinds of war losses, and distinguished the subject's rights against his State in respect of them. On the one hand there were losses caused by the enemy, on the other those caused by his own State; and the latter he further subdivided into—

(1.) Losses caused by the voluntary and deliberate action of the army by way of precaution or strategy.

(2.) Inevitable accidents of war caused either by stress of circumstances or without premeditation.

For the second class the State incurred no strict obligation, though, if its finances allowed, it was equitably called upon to give compensation to the citizen; but for the first it was under a clear obligation to give an indemnity at the close of the war. For example, if the army destroyed buildings or bridges, or set fire to granaries in places where the enemy were not actually present, it must repay the private owners. For these were acts done with the free will of the State; torts, as it were, committed by it against its members, which involved liability, because they could not be ascribed to an imperious necessity. As regards losses inflicted by the enemy army the State had no obligation; though here, too, if it could afford it, and especially if it received a war indemnity, it was equitably called upon to compensate the sufferer.

These distinctions of Vattel are founded on general reason, and have been the basis of modern practice. They were first applied by the French National Assembly during the revolutionary wars. The National Convention of 1793, which laid down the modern conception of war in its relation to private property, declared that the State would make good all the losses incurred by citizens for the national defence. In this sense it interpreted the third principle of the French Revolution, "Fraternity," and gave expression to the doctrine of the solidarity of the State which has characterised the democratic Governments of Europe in the nineteenth century. In point of fact, it found its finances insufficient to give a complete indemnity to the citizens affected by the invasion of the Allies, but it gave substantial relief to them and ushered in a new practice which has been regularly followed in France. Napoleon, by the enormous exactions which he made in foreign countries, was able to compensate his own people for their sacrifices; and the Government of Louis XVIII., at the end of the Napoleonic wars, voted from the national funds 100,000,000 francs for the relief of the subjects' war losses, in addition to a sum of 40,000,000 francs which came out of the royal treasury. Again, in 1871 the French National Assembly, asserting broadly the principle of fraternity, proposed a law taking upon the State the burdens which had been imposed by

the German invaders upon the French people. "Les contributions de guerre, les réquisitions soit en argent soit en nature, les amendes et les dommages matériels directs que la guerre a fait subir aux habitants, aux communes et aux départements d'une partie de territoire français seront supportés par toute la nation."

This was a comprehensive and generous proposal of the Assembly, but on behalf of the national credit Thiers interceded for and carried a more moderate resolution, granting limited relief to all who had suffered. In place of indemnity a sum of 100,000,000 francs was put at the disposal of the Ministers of the Interior and Finance, and in 1873 this was supplemented by another State grant of 120,000,000 francs. But it appeared that the total losses to individuals by the German occupation amounted to nearly 700,000,000 francs, of which 134,000,000 were for requisitions, 102,000,000 for billeting troops, and 29,000,000 for contributions. Many losses, therefore, could only be partially compensated. Those who had advanced contributions on behalf of the community were repaid in full, and it was laid down in the French Courts that it was the law of the land that payments, whether in money or kind, by individual citizens, when demanded by a properly commissioned officer of the enemy, were to be considered as made for the general body, and were not losses incidental to war for which the subject could not claim redress.[1] In default of payment by the invader, his own State was pledged to indemnify him, and to the same effect a law was passed in 1877 pledging the responsibility of the State for requisitions made on French soil by a French army. In their disposition of the relief granted by the Assemblies of 1871 and 1873 the French drew no distinction between their own subjects and domiciled neutrals who had suffered by the invasion, and therein they offered a splendid contrast to the German Government, which refused to give any compensation to the Swiss at Strasburg who had suffered by their bombardment. Despite the enormous indemnity which they received from France, the Germans gave

[1] Cf. Dalloz, Jurisprudence, Supplément, Vol. XV. p. 457 ff.

compensation only to persons who were domiciled on German soil in 1871, and of these to subjects of those neutral States only who promised reciprocal treatment in a similar case. Bismarck refused compensation to Germans settled in France who had suffered by the war, and who, of course, could get no relief from the Government of their domicile, on the ground that if citizens carried on business abroad they must take the risks of losses as well as the prospect of greater gains which such trade offered.

France, then, has shown the way towards a more generous usage and a fuller recognition of the solidarity of the State; while Prussia, from motives of policy, in 1866 indemnified in part the subjects of Saxony, upon whom it had imposed requisitions during the war, and in the Franco-German war recognised, though grudgingly, the duty of the State to pay back to its own citizens some of their war losses.

The most generous practice, however, hitherto recorded is to be found in England's conduct towards the conquered Boers after the South African war of 1900—1902. Here was not so much a case of a country compensating its own loyal citizens as of a victor charging itself to relieve the conquered subjects. And her action in this way forms a fitting pendant to England's general conduct of war on land, which has always been most progressive and regardful of individual rights. By the Treaty of Vereeniging she covenanted to set aside the sum of 3,000,000*l.* for repatriating the Boers, and beyond this "to allow all notes made under Law 8 of 1900 of the South African Republic, and all receipts given by officers on the field of the late Republic or under their orders, to be presented to a Judicial Committee, and if such notes and receipts are found to have been duly issued in return for valuable consideration they will be received by the Commissioners as evidence of war losses, and will give a right to compensation." In other words, England took on herself to honour not only the obligations of her own officers, but those of the enemy's officers. She followed here the example set by Italy in Lombardy in 1859; but Italy's action was perforce, whereas hers was voluntary.

As regards other precedents of conquest, the United States Government had refused to give any compensation for the damage caused in Alabama by Shearman's raid, and Germany had refused to compensate Danish subjects for requisitions in Schleswig-Holstein after the war of 1863—1864. England's action was then a forward step in the recognition of State responsibility for war losses, all the more remarkable in that it was an obligation which was assumed as an Imperial one by the mother-country, whose taxpayers were called upon to pay 4,500,000*l.* sterling for the exactions of the contending armies upon conquered subjects thousands of miles away! Nor did England's generosity stop at the payment of requisitions. The Government made a voluntary gift of 2,000,000*l.* towards relieving the other war losses of loyal subjects and neutrals, excluding only from a share of this subvention limited liability companies and large firms. It has been said that "Solomon himself, even if backed by the purse of Fortunatus, would probably make more enemies than friends if he had to give compensation for war losses."[1] And doubtless the commissioners did not satisfy everybody in their adjudication of the money. Over two thousand claims of foreigners alone were considered, and, though claimants only received a dividend, the compensation paid to conquered subjects and strangers was greater in proportion to the loss than that paid by the French Government to their own subjects in 1871.

England's generous example in the South African war can hardly be regarded as a precedent for future international usage, for few other nations would pursue so enlightened a policy towards their late enemies. But at the same time, taken in combination with the French practice during the nineteenth century and other indications, it shows that the State is now willing to assume part responsibility for the war losses of subjects, to compensate them fully for regular exactions, and, so far as it can, for exceptional damage. The habit of compensation may be considered as the recognition in national law and policy of the modern international conception of war which is

[1] Beale, Aftermath of War.

embodied in the laws drawn up by the Hague Conference. Just as the belligerent must direct his attack upon the State and not on the citizen, so each nation itself must at the end of war make the burden of loss as far as possible national, and reinstate private persons in their property. Viewed in relation to the broad currents of political development in modern times, it illustrates the introduction of State Socialism into the sphere of war and international law. The solidarity of the nation, which in the Middle Ages justified the destruction of the property of the individual enemy subject, now has as its corollary the compensation of the individual by his own State for losses incurred on its behalf.

CHAPTER V.

WAR AND COMMERCE BETWEEN BELLIGERENTS.

Besides its interference with private property in the way of destruction and appropriation, war affects the production of wealth between enemy subjects; for the general law of nations is taken to put a stop to all intercourse between them on the outbreak of war. Bynkershoek stated the principle which since his time has been considered binding: "Ex natura belli commercia inter hostes cessare non est dubitandum." The reason of the law is that it is incongruous for States to be at war and their citizens to continue their ordinary peaceful intercourse, which may involve mutual service and enrichment. The aim of a belligerent is to weaken his enemy by every possible means, so as to impair his powers of resistance; if he had the power he would prohibit all trade with him altogether. For commerce provides the sinews of war either directly, by the supply of war material, or indirectly, by the creation of wealth. The former kind of commerce the belligerent, in view of his overbearing necessity, has a right to interdict altogether against neutrals and his own subjects alike. The latter he forbids by his sovereign power to his subjects, to his enemies *jure belli;* but except as a part of military operations, *i.e.*, by siege or blockade, he cannot enforce the prohibition on neutral subjects. A further reason for annulling contracts between enemy subjects is that the alien enemy has no *locus standi* in the Courts during war: he is *ex lex*, outside the law, and cannot sue on any contracts or torts either personally or by attorney during hostilities.

It is through his municipal law that a belligerent sovereign enforces these rights against his subjects, and he may, in his own interest or with a view to obtaining certain commodities, or, again, by way of comity, exempt by royal licence specific kinds of trading, or all trading for a limited time from the

general prohibition. "Prout e re sua subditorumque suorum esse censent principes," as Bynkershoek says. But otherwise the prohibition occurs *de facto* on the outbreak of war. The English Government waived its strict rights at the opening of the Crimean war, when, by an Order in Council after the declaration of war, six weeks were given to all vessels trading with the enemy to load and depart, and all trade and contracts between enemy subjects which could be carried out during that time were held to be valid.[1]

The illegality of trading with the enemy was not at first recognised by the English common law; but Lord Stowell's judgment in the case of Hoop[2] was taken as authoritative, and from this time the doctrine of the Admiralty Court, which had always maintained the illegality, may be considered to have been incorporated into the general law of the country.

The effect of the law is:—

(1.) That any goods seized after the outbreak of war by an English cruiser, which prove to be proceeding to or from an alien enemy trader, are confiscated to the captor.

(2.) That any contract made upon such trading is illegal and invalid, and will not be enforced by the Courts either during or after the war.

(3.) That all contracts made between people residing in the belligerent countries are void.

A theoretical exception to this last rule exists in favour of contracts arising out of the state of war, as ransom bills given by the master of a captured merchantman to his captor in consideration of release;[3] but as these transactions have been discountenanced by all the chief European Powers during the last century, they need not be seriously regarded. Apart from contracts arising upon trade between enemy subjects, war theoretically dissolves all executed and all executory contracts

[1] Clementson *v.* Blessig, 11 Exch. 135. An indulgence of this nature will probably be the rule in future, in order to avoid ruinous interference with half-completed transactions.

[2] 1 C. Rob. 196.

[3] Cf. Cornu *v.* Blackburne (1781), 2 Doug. 640; Snow, p. 310.

existing between them, which require further acting upon during hostilities, and suspends all executory contracts which do not require to be acted upon, the rights of the parties reviving at the termination of hostilities. There are in modern practice several exceptions to this rule which will be examined, but the general law holds good, that where the nature of the contract is inconsistent with suspension the effect is to dissolve the contract and absolve both parties from the further performance of it. The leading case on the subject is Esposito *v.* Bowden.[1] A neutral ship had been chartered in 1854 to proceed to Odessa and there load a cargo for English freighters. Before the ship arrived, war had broken out between England and Russia, and the contract could not be proceeded with, without involving a trading with the enemy and possible forfeiture of the cargo upon that ground. It was held, therefore, that though the contract was with a neutral shipper it was dissolved by the outbreak of war, being of a nature which did not permit of suspension.

In the struggles at the beginning of the nineteenth century, when the prize law of England and the United States was for the most part built up, the rule against trading with the enemy was applied with very great severity; with such severity, indeed, as occasionally to defeat the true purpose of the law and to lose any rational justification. There was great bitterness between the parties in those wars, which were struggles for existence and self-preservation, and this feeling tended to the undue extension of belligerent rights. But beyond this, it was the policy of Governments then to offer every possible encouragement to privateers so as to destroy the enemy's commerce, and in order to effect this object it was regular for Prize Courts to press the law in favour of the captors. The onus of proving innocence was heavily laid upon the owners of the vessel or cargo. A modern Court might agree that no specious sale to or from a neutral should save the subject's goods from confiscation if the transaction was in fact and substance a trading with an alien enemy.[2] But it would hardly approve of the reasoning

[1] 24 L. J. Q. B. 210; 4 E. & B. 763.

[2] Jonge Pieter, 4 C. Rob. 79.

by which country in the military occupation of the enemy was for purposes of trade regarded as enemy country, and goods in transit between it and England were confiscable.[1] Harshest of all were the American sentences against property which a subject shipped on the outbreak of war from the enemy country in which he had been domiciled to his own land;[2] and against property which an American domiciled in the enemy country had shipped to his own country for commercial purposes before the declaration of war had been made, but which was intercepted after hostilities had broken out.[3] This verdict of a majority of the United States Supreme Court was an application of the letter which entirely defeated the spirit of the law, and almost a *reductio ad absurdum;* for it amounted to impoverishing loyal subjects who in the interests of their country's trade had migrated, without giving them the option of showing whether in changed circumstances they would return to their country of origin. As Marshall, C. J., in his dissenting opinion said, "Reason and justice required that question to be left open to be decided before the goods were condemned."

A large part of the authority about trading with the enemy is really obsolete, but unfortunately, being embodied in case law, it has not been swept away. But it applied to times when privateering was regular and looked on with favour. By the Declaration of Paris, which abolished privateering, circumstances have radically changed. The same International Declaration has also exempted from capture all goods carried in neutral vessels save contraband of war, and the rights of the belligerent against the property of his own subjects are limited accordingly, together with his rights over the property of his enemy. Previous to the Declaration, during the Crimean war, all trade between subjects and enemies, save contraband and blockade trade, was allowed by the three belligerent powers so long as it was conducted in neutral bottoms; and since the Declaration the right to confiscate is barred under these conditions.

[1] Blackburne *v.* Thompson, 3 Campbell, 61.

[2] The Rapid, Snow, p. 288; 8 Cranch, 155.

[3] The Venus, 8 Cranch, 53.

The tendency in certain Continental nations is to legalise such commerce generally, on the ground that it will yield a balance of advantage to the country. By German law, a license to trade is presumed, and explicit notice is required to forbid specific kinds of commerce. But contraband trading, of course, is always prohibited, and the participation of a German citizen in the Morgan (English) war loan to France in 1870 was held illegal and invalid. In France and England the older principle prevails that all commerce is interdicted by the mere declaration of war, and that special licenses are required to permit any limitation of the rule. Both nations granted a general license to all trade during the China war of 1860, but the circumstances were exceptional. In theory the prohibition of communication extends to postal or telegraphic correspondence (cf. Despagnet, Droit des Gens, 715 E.), but it may be presumed that correspondence would not be severely restricted, unless it was suspected of being concerned with military secrets. It is interesting to note that in the only prize case which was decided in the South African war ("The Mashona"), the Supreme Court in the Cape condemned the cargo of English merchants destined for the Transvaal, including goods consigned to domiciled neutrals, on the ground that it offended against the law of trading between enemy subjects.[1]

The old law in regard to contracts made upon trade or otherwise with enemies appears also to remain good in England and the United States, save for certain modifications necessitated by new economical conditions. It is most clearly illustrated by the rules governing maritime contracts. Thus, an insurance of a vessel or cargo made with an English company cannot be held to cover capture by an English cruiser during war with the country of the insured owner. This was decided originally in the case of Furtado *v.* Rogers (C. P. 1802),[2] when Lord Alvanley, C. J., held that "the insurance was illegal, because it is in contravention of his Majesty's object in making war, which is by the capture of the enemies' property and by the prohibition

[1] The case is reported in the Journal of the Society of Comparative Legislation, N. S. Vol. II. 326—341.

[2] 3 Bos. & Pull. 191; Snow, p. 303.

of any beneficial intercourse between them and his own subjects to cripple their commerce." The insurance is in fact a protection and enrichment of the enemy, and, even if the money is not payable till the end of the war, the encouragement to trade may have produced an adverse effect during hostilities.

The guiding principle is stated in Bynkershoek: "Hostium enim pericula in se suscipere quid est aliud quam eorum commercia maritima promovere?" The judgment of the House of Lords in Janson and Driefontein Mines Co.[1] suggests that the old law about insurance is still valid, but will be strictly limited to insurance covering losses of the king's enemies during the war itself; *i.e.*, it will not extend to acts done in contemplation of war, and the policy is valid to cover any losses incurred by the insured through the action of a sovereign who is preparing, but has not declared, war against this country. In this case gold commandeered by the Transvaal Government was held properly insured. "It is war, and war alone," said Lord Halsbury, "and not the probability of war, which makes trade illegal."

This decision is to some extent a correction of the judgment in Aubert *v.* Gray,[2] justified by the different conditions of land and naval war. In the case just cited it was held that an embargo placed by the Government of the insured owner for purposes connected with *imminent* hostilities against the Government of the insured was *not* within the policy. For in naval war a precautionary embargo laid on hostile ships is—or rather was at the time of the decision—retrospectively turned into a valid capture of enemy property by the outbreak of war. (Cf. "The Boedes Lust."[3]) Hence it can be considered as an act of hostility, and not covered by an insurance contract between enemy subjects. This is not the case with commandeering on land, nor with an embargo laid upon neutral vessels, which, therefore, are incidents properly covered by English policies, unless they contain special warranty against detention.[4]

[1] (1902) A. C. p. 484 ff.

[2] 3 B. & S. 163.

[3] Snow, p. 249; 5 C. Rob. 245.

[4] Cf. Robinson *v.* Alliance Insurance Co., (1904) A. C. 489.

The law of charter-parties in war time is analogous to that of marine insurance.[1] Any charter-party which becomes illegal by war, *i.e.*, which involves the transport of English goods to an enemy port or *vice versâ* is dissolved; so, too, is one which compels the ship of a subject to enter the port of an enemy, and thus makes it liable to confiscation. Even though the charterer is a neutral and his goods are neutral, the master has the right to dissolve the contract, for he runs the same risk of capture. In the case of "The Teutonia,"[2] it was held that the contract of a German shipowner to deliver goods to Dunkirk was dissolved by his reasonable (though erroneous) belief that war had broken out between his country and France. Nor can a shipmaster recover his freight, if he carried the goods of an English merchant to the agreed destination, on the release of his vessel from an embargo laid upon it by the Government as a measure of hostilities. This was held in the case of Tonteng *v.* Hubbard,[3] where a Swedish vessel had been detained, and afterwards transported English goods as agreed.

In regard to contracts, then, which are or require to be acted upon during war, or profess to cover the effects of war, it is clear that they are not valid between enemy subjects, and are therefore dissolved. It is only reasonable that English commerce should not be endangered or hostile commerce safeguarded by contracts of these two kinds, and neutral shippers or owners of cargo have no preference over belligerent where English cargo or English ships are concerned. The considerations, however, are different with executed contracts which do not require to be acted on during the war. Here there appears no good reason why war should do more than suspend the rights of the parties without annulling the contract, till they are in a position to sue again in the courts of one of the belligerents. This, in fact, is the general principle of modern usage. Except in the case of the American civil war, where the situation was aggravated because one of the belligerents was regarded as a rebel State, contract debts are not now regarded as confiscated by war.

[1] Cf. Carver, p. 280 ff.

[2] Snow, p. 250; 4 P. C. R. 171.

[3] 3 B. & P. 291.

A subject of the belligerent can in his own courts actually sue an enemy subject during war upon them, and in this case the latter in his absence can have all the necessary means of defence, *e.g.*, representation by attorney. This was held in the American case of Dorsey *v.* Kyle,[1] on the ground that it was not against public policy for a creditor to proceed against the property of an alien enemy debtor by attachment or otherwise. He has all the usual remedies against a non-resident debtor. When an English creditor could get execution against the property of his enemy debtor, he might do so during hostilities. Otherwise his right revives at the end of the war.[2] But the right of an enemy creditor does not revive till the end of the war in any case, and the better opinion is that the Statute of Limitations does not run during war. (Hanger *v.* Abbott.[3]) The English authorities, *semble*, are the other way. (Cf. Anson on Contracts, 10th ed. p. 220, and Lindley on Companies, 6th ed. p. 83.) The only case, however, upon the point is De Walsh *v.* Braune.[4] There, a married woman during the Crimean war claimed a right to sue for debt as a *feme sole*, while her husband was a domiciled enemy in Russia, on the ground that he would be barred by statute on his return. Bramwell held "the inconvenient operation of the Statute of Limitations is no answer and does not take the case out of the general rule." This is only an *obiter dictum* and probably would not be upheld now in view of the later and more reasonable American practice.

Where a contract, though not necessarily requiring to be acted upon during the war, could not be resumed at its termination in the same position as it stood when broken off, it is held to be straightway dissolved. This is done to avoid injustice to one or other of the parties. Thus, commercial partnerships between citizens of two States are dissolved by the breaking out of war between those States, and the declaration of war itself furnishes the necessary legal notice of such dissolution. (Cf. Griswold *v.* Waddington.[5]) As Spenser, J., said there: "the

[1] Amer. Decisions, Vol. XCVI. p. 617, &c.

[2] Ex parte Boussmaker (1806), Snow, p. 267.

[3] 6 Wallace, 532; cf. p. 9, *supra*.

[4] 25 L. J. N. S. Ex. 343.

[5] Snow, p. 274 ff.; 15 Johnson, 57.

state of war creates disabilities, imposes restraints, and exacts duties altogether inconsistent with the continuance of the relation . . . and the rule prescribed by Roman law is applicable: Si alicujus rei societas sit et finis negotio impositus est, finitur societas." There are, however, certain cases on the border-line where it is not quite clear whether it would be fairer to allow the contract to stand or to dissolve it; upon these the decisions vary, though the tendency in modern times is to uphold them. In the case of a life insurance contract, when premiums have to be paid from year to year on pain of forfeiture of the policy, a majority of the United States Supreme Court held in 1876 that the outbreak of war which made the payments impossible between enemy subjects annulled the policy,[1] and did not permit of its revival at the completion of hostilities; "though the insurer has an equitable right to have the amount of the premiums already paid up, subject to a deduction for the value of the assurance enjoyed by him while the policy was in existence." Two of the judges, however, dissented from this decision on the ground that: "When the parties to an executory money contract live in different countries, and the Governments of those countries become involved in public war with each other, the contract between such parties is suspended during the existence of the war and revives when peace ensues. And that rule in our judgment is as applicable to the contract of life insurance as to any other executory contract."

A decision in accordance with this view had been given in the Kentucky Supreme Court in 1869, in the case of the New York Life Insurance Co. *v.* Clopton,[2] when it was declared that a contract of life insurance is not dissolved against technical enemies even though the last three premiums were not paid. The judge considered the rule laid down by Lord Ellenborough in Brandon *v.* Curling,[3] which, extending the dissolution of contracts to insurances of all enemy persons and property, stated that a policy should not extend to cover *any* loss happening during hostilities between the country of the assured and the

[1] Cf. New York Life Insurance Co. *v.* Statham, Snow, pp. 278—282; 93 U. S. Rep. 24.

[2] 7 Bush. 179; cf. Cohen *v.* New York Life Ins. Soc., 50 N. Y. 641.

[3] 4 East, 410.

assurer. But he refused to follow it on the ground that it was unfair and unnecessary in the case of an insurance on property or persons exempted by law from the belligerent power. In other words, he was of opinion that the new conception of war which makes it primarily a relation between States affected contracts between enemy subjects. He held, too, that continuing performance was not essential to a life insurance, and awarded the claimant the payment of the policy less the amount of the three unpaid premiums. This is only one of several examples of the relaxation of the rule against intercourse between enemy subjects which were provided by the United States Courts after the civil war. No doubt the circumstances were peculiar, because many individuals in the closest relation and kinship with subjects of the Federal States had become technical enemies for a time in virtue of residence within the area of the Confederates' authority. At the end of the war they returned to their old condition, and the Courts in some States showed themselves as unwilling after the war as they had been willing during the war to press against them the full rights of a belligerent State.

These decisions, therefore, cannot be accepted as certain precedents because of the special circumstances; nevertheless the practice and dicta of the United States Courts mark a definite change in the attitude to contracts between enemy subjects made before war, when those contracts do not in fact imply any actual enrichment or strengthening of the enemy during the continuance of the war. The new commercial conditions of the world demand that war shall not interfere with the incorporeal any more than with the corporeal private property of belligerent subjects, save when the upholding of a right of action would add to the security or strength of the enemy during the contest, as in the case of marine insurance contracts. The extent of prohibition and the tendency to limit the area of restriction were well expressed by Gray, J., in the case of Kershaw and Kelsey,[1] when he held that as between lessor and lessee there was not necessarily trading between

[1] Cf. Snow, p. 295; 100 Massachusetts Reports, 561.

enemies, and that covenants which implied trade made by them during war were in certain cases valid:

> "The law of nations as judicially declared prohibits all intercourse between citizens of two belligerents which is inconsistent with the state of war between their countries; and this includes . . . any act or contract which tends to increase his resources, and every kind of trading or commercial intercourse, whether by transmission of goods or money, or by orders for the delivery of either between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy. Beyond the principle of these cases the prohibition has not been carried by judicial decision. The more sweeping statements in the text books are taken from the dicta which we have already examined, and in none of them is any other example given than those just mentioned. . . .
>
> "At this age of the world," he continued, "when all the tendencies of the law of nations are to exempt individuals and private contracts from injury or restraint in consequence of war between their Governments, we are not disposed to declare such contracts unlawful as have not been heretofore adjudged to be inconsistent with a state of war."

The war in South Africa provided examples of a different kind of relaxation of the rule about contracts between enemy subjects which, however, manifests the same spirit. It dealt with the relations of limited companies—a sphere of law which continually increases in importance, and in which the effect of war has not yet been clearly determined. Here again the special circumstances of the war preclude us from accepting the English usage as authoritative for all times and countries, but it affords at least an indication that in dealing with the trading rights of companies, a belligerent will take account of the real nature of the shareholders' position rather than of their technical character. Theoretically the rights of shareholders in a limited company are contract rights, and war should dissolve the con-

tracts which exist between either an enemy shareholder and an English company, or an English shareholder and an enemy company; seeing that they involve (technically) a continuing liability on the one side for calls on the shares, and an obligation on the other to pay a half-yearly or yearly interest, to say nothing of the shareholder's nominally continuing right to help in the control of the business. Some English authorities have accepted the strict technical view of a shareholder's contract, and approved accordingly the application of the ordinary laws of war. Lord Lindley, *e.g.*, is of opinion that the rights and liabilities of an enemy member of an incorporated company are suspended during the war.[1] Dr. Baty goes so far as to suggest that they should be abrogated altogether at the outbreak of war, allowing the holder only an inchoate right to a share of the company's assets at that moment.[2] He advances the doctrine on the analogy of the effect of war upon partnerships, failing to realise the real difference between the two sets of conditions. Mr. Chadwick, in an article which appeared in the "Law Quarterly Review," points out that shareholders differ from partners in the following among other points:—[3]

(1.) Their limited liability.

(2.) Their absence of real control over the concern, which is practically in the hands of directors.

(3.) In being members of a corporation, which is a distinct legal person.

These differences suggest that there should be a difference of treatment in the event of war, and this suggestion is supported by the consideration of the enormous inconvenience which would ensue in case of the abrogation of their rights, "an inconvenience far greater than the hypothetical injustice caused by their remaining members and continuing their liability." And apart from the consideration of expediency it may be pointed out that shares in a company, though technically contractual rights, are substantially and in fact rights of property, and viewed in this light they cannot be confiscated at the outbreak

[1] Treatise on Companies, p. 53.

[2] Int. Law in South Africa, Chap. VI.

[3] Cf. L. Q. R. Vol. XV. p. 170, etc.

of war. For belligerents have now resigned the power they once exercised of seizing the property of alien enemies in their own territory, and this rule must equitably extend to incorporeal property.

The law, as Lord Stowell once said, looks to the fact and not to the fiction, and in fact shares are property. The only change which is logically rendered necessary in the position of shareholders of public companies is the suspension of payment of interest till after the war. Nor need suspension imply discontinuance, for the interest (if any) might be allowed to accrue till the end of hostilities. In the eighteenth century it was recognised that holders of stock in a public debt of an enemy country should receive their interest even during the war, and it is perhaps equally reasonable that shareholders should take their interest from an alien enemy company even during the war. Moreover, the desirability of giving security to foreign investors even in times of war is almost as great in the case of big trading corporations as in the public funds. To attract foreign capital to big business enterprises, it is necessary that it should not be endangered by the outbreak of war between the country of the investor and the country of the company in which he invested his money. It may be otherwise with a company which provides a belligerent with the means of war; for in such a case it is inexpedient that an enemy subject should assist its operations, in however small a degree, by retaining his capital therein. But with ordinary public commercial undertakings this consideration does not apply, and to these the principle of the "Silesian loan question"[1] might be applied.

So, too, there seems no reason, in view of the conditions of modern finance, for applying to enemy debenture holders an American decision of last century, whereby a mortgagee could not sue for arrears of interest accrued during hostilities.[2] The ground of this decision was that the creditor could not have recovered his principal during the war and therefore was not entitled to his interest. Even if we accept the argument, it

[1] See above, p. 8.

[2] Hoare *v.* Allen, 2 Dallas, 102.

would not apply to interest due until the loan matured, because the right to such interest vested in fact before the war began. Again, in the case of perpetual debenture stock, interest should run during the whole war, and be payable upon the completion of hostilities, if the company has adequate receipts.

All that is required by the prohibition of commercial relations between enemy subjects during war is that payments should not be made during hostilities which could aid the enemy State in his struggle. The structure of modern commerce, and the vast number of companies which comprise shareholders of all nations, demand that the old thumb-rule about the abrogation of executory contracts, which was never meant to apply to these new circumstances, should not arbitrarily and unreasonably be extended to them. The interests of England, whose people has so much capital invested in foreign companies, would be severely prejudiced if such a scheme as Dr. Baty suggests, or even the rule of Lord Lindley, were universally adopted against us in case of war. In cases of private companies only, when a director is a domiciled, or a natural, enemy subject, it would seem desirable to rescind his rights and give him an equitable compensation at the outbreak of war, or if necessary wind up the whole concern; for the director of a private company is very much in the position of a partner. The article in the treaty between England and the United States of 1795, "that neither debts due from the individuals of one nation to another, nor the shares nor the monies which they may have in public funds or in private or in public banks shall in any event of war be sequestrated or confiscated," might well be extended now to the shares in public or private companies. And, further, it seems advisable to allow interest on shares and debentures held by alien enemies to run during war, even though it be not paid till the end of the war; and in return to maintain the liability of alien shareholders during war, unless there are special reasons against this. An exception would be made in favour of enemy shareholders when some peculiar hardship would result. Here the Courts might grant equitable relief and give the holder the estimated value of his share before war. Postponement in the place of confiscation seems to provide the solution required by

new commercial conditions. The treatment of companies during the Transvaal war points, at any rate, to a new custom, even though the precedents cannot be pressed; because in this case the companies, though nominally enemy, were largely British in membership.

There was no insistence in our courts upon the forfeiture of membership by English shareholders in companies incorporated in the Transvaal; and, in fact, the Driefontein Mining Company repaid to English creditors without protest, during the war, the instalments of a loan incurred before it. Further, the Government, as successor to the Transvaal Government, paid all arrears of debenture interest to English shareholders of an enemy company, viz., the Pietersburg-Pretoria Railway Company, Ltd., at the end of the war. The desire for stability of commerce and maintenance of credit will, no doubt, in future induce all Governments to make the suspension of private rights in war time as small as possible, and to insist on abrogation only when it is clearly necessary. The basis and the purpose of the belligerent's prohibition of commerce between enemy subjects is to weaken the enemy, or at any rate to prevent his power of resistance being increased by any act of his own people. In cases where these ends are not advanced there is no reason to prohibit trading, or to annul contracts. And so delicate is the organism of modern commerce that all gratuitous interference with it should be avoided. The harm done to national prosperity by sweeping restraints on trade may far outweigh the harm done to the enemy.

CHAPTER VI.

THE EFFECT OF CONQUEST ON PRIVATE PROPERTY BY LAND.

It has been shown that the Roman and mediæval theory of conquest involved the complete forfeiture of all private property by the conqueror, who obtained full dominion over the conquered territory. The law of force was permitted to reign after the termination of hostilities, or rather, conquest was considered to amount to a new acquisition. Grotius[1] recognises the right of the conqueror to take the land of the conquered; but he marks an advance upon the old theory of complete forfeiture arising straightway out of the existence of war, when he declares that such appropriation must be made by the State and not by the individual; and, further, he establishes a distinction between the well-established conqueror and passing military occupier, and does not concede to the latter a right of expropriation. Vattel[2] marks a further appreciation of the right of private property. He admits that the victor may retain as an "expletio juris" so much moveable private property as will satisfy his just claim; but when he takes a town he cannot justly acquire over it any other rights than such as belonged to the sovereign against whom he has taken up arms. He describes as monstrous the suggestion that the conqueror is absolute master of his conquest, and may dispose of it as his property. He has rights only against the conquered sovereign rather than over the conquered people, and the limit of his proper dominion is to lay burthens on the conquered nation to indemnify himself for the expenses or damages which he has sustained. Similarly, Montesquieu, in his "Esprit des Lois," says that not only does the law of nature counsel a moderate

[1] De Jure Belli, III. vi. 11.
[2] Vattel, Droit des Gens, Bk. III. Ch. 13.

use of conquered land, but that conquest, being in nature a form of acquisition, implies, like other acquisitions, the conservation of what is acquired. In the nineteenth century the old title of conquest based on force, by which the conqueror claimed the lands and the moveable property of the conquered people as the prize of war, has been abandoned. The municipal laws of civilised countries have given effect to the general consensus that the right of forceful seizure expires at the close of hostilities, and, therefore, private property in the conquered land is subject to the law which the conqueror applies to private property in his own land.

A fresh jural basis has been discovered, which is thus stated by Professor Westlake[1]: "The idea of the succession of State to State, as an institution of international law, comparable to succession on death as an institution of private law." Moreover, the distinction between conquest and military occupation has now been made perfectly definite, and their effects are no longer confused. The condition of conquest is now considered to arise in two ways and in two ways only:—

(1.) When there is a complete extinction of a State as an organised body performing the functions of government (as in the case of the South African Republic at the end of 1900).

(2.) When a province of a sovereign State, already held in military occupation, is ceded at the treaty of peace, and the rights of the original sovereign are definitely resigned (as in the case of Port Arthur, which was ceded by Russia to Japan by the treaty of 1905).

The main principle which underlies the modern conception of conquest in either case is that the State in succession must not interfere with the continuance of ordered civilised life in the territory, and must disturb as little as possible the rights of private property. Until recently one peculiar survival of the old right of appropriation remained to the conqueror. He habitually claimed the right to forfeit the property of any inhabitants of the conquered territory who would not accept the

[1] Cf. Westlake, International Law, Vol. I. p. 68 ff.

new allegiance imposed on them, and chose to adhere without special treaty stipulation to their former State. Even as late as 1866, in the case of U. S. *v.* De Repentigny,[1] it was laid down that, "It is a rule of public law that the conqueror who has obtained permanent possession of the enemy's country has the right to forbid the departure of his new subjects or citizens from it, and to exercise his sovereign authority to them." And this exercise of authority may include the seizure of their landed property. The circumstances of the case were peculiar, referring as they did to the effect of events a century back; and the decision is not altogether applicable to modern times. Le Sieur de Repentigny had received a large concession of land from the French king in the French-American provinces. When these were conquered by the English in 1760 and ceded by the Peace of 1762, he refused to change his allegiance, and failed also to fulfil the conditions of a proclamation of George III., which allowed a conquered subject to dispose of his land to an English subject, and carry off his personal belongings within eighteen months if he was not willing to change his allegiance. By his default the United States, as successor to the rights of the English Crown through the cession of Michigan in 1784 to them, claimed that the lands had been forfeited to the State.

The classical case upon the old rights of the conqueror is that of the Elector of Hesse-Cassel,[2] whose kingdom was occupied by Napoleon I. after the battle of Jena. Napoleon remained in possession for seven years, and, assuming the right of a conqueror, he forfeited the private property of the Elector, who had fled from his dominion. The validity of his action was raised on the restoration, in 1815, of the Elector; and after long consideration the ultimate judgment of the German doctors upon this point was that Napoleon had in fact effected a conquest, and had a right as sovereign to confiscate the property of an enemy of the State who had refused to do allegiance.

In modern times, however, although the conquered subject can hardly be considered to have a right *de jure* of withdrawal from the new allegiance, it is usual to insert in the treaty of

[1] 5 Wallace, 213 ff.

[2] Snow, 381.

peace a clause securing the liberty of the inhabitants of a ceded territory to retain their old nationality,[1] and their right to arrange their affairs and dispose of their property within a certain time.

By the Treaty of Frankfort (1871) natives of Alsace-Lorraine who chose to retain their French nationality were allowed to keep their landed property in the ceded territory. This liberality is again evidenced by the terms of the treaty of peace between Russia and Japan.[2] By Article V., which deals with the cession of Port Arthur, "The Government of Japan undertakes that the proprietary rights of Russian subjects in the territory above referred to shall be perfectly respected." And by Article X., which deals with the cession of part of the island of Sakhalien :—

> "It is reserved to Russian subjects inhabitants of the territory ceded to Japan to sell their real property and return to their country; but if they prefer to remain in the ceded territory, they will be maintained and protected in the full exercise of their industries and rights of property on condition of submitting to Japanese laws and jurisdiction. Japan shall have full liberty to withdraw the right of residence in or deport from such territory any inhabitant who labours under a political or administrative disability; she engages, however, that the proprietary rights of such inhabitants shall be fully respected."

Here we see that the conquering Government has given up all the rights of forfeiture of private property in a ceded territory that used to be considered to belong to it. And the history of the development of International Law proves that rights first secured by treaties gradually pass into rights *de jure*.

The report of the Transvaal Commissioners shows that the same broad principles are coming to be recognised in the case of State extinction.[3] It is true that, following a

[1] Cf. Hall, International Law, 572, 573, and notes.

[2] Cf. Stoerk's Collection of Modern Treaties, Vol. XXXIII.

[3] Parl. Papers, 1901, Report of Transvaal Concessions Commission; General Principles. I have taken this report as a standard of English usage at the present time. The appointment of the Commission and its operations are a good example of the modern treatment of private property in conquered land.

common English attitude, the Commissioners say "that the principle of the immunity of private property is one of ethics rather than law"; but, at the same time, they recognise that "the area of war and suffering should be, as far as possible, narrowly confined, and that non-combatants should not, when it is avoidable, be disturbed in their business." And in Article XI. they say:—

> "In the case of the annexation of Hanover to Prussia (which affords the nearest parallel to the present case), a principle was proclaimed by the conquerors which His Majesty's Government will imitate: 'We will protect everyone in the possession and the enjoyment of his duly acquired rights.' We are convinced that the best modern opinion favours the view that, as a general rule, the obligation of the annexed State toward private persons should be respected, subject to certain qualifications: *e.g.*, an insolvent State could not by aggression, which practically left to a solvent State no other course than to annex it, convert its worthless into valuable obligations. Again, the annexing State would be justified in refusing to recognise obligations incurred by the annexed State for the immediate purposes of war against itself; and probably no State would acknowledge private rights, the existence of which caused, or contributed to cause, the war which resulted in annexation."

These exceptions to the succession of State responsibility in cases of conquest seem well justified in theory and substantiated in practice, and must be regarded as limitations upon the complete immunity of private property after conquest. The United States, after the conquest of Cuba from Spain, refused to take over the Cuban debt,[1] which had been mainly raised by the Spaniards for the purpose of fighting the rebels and afterwards of carrying on the war against the Americans. Similarly, England with reason refused to recognise the sale by the Transvaal Government of its shares in the Netherlands South African Railway Company[2] after the proclamation of annexa-

[1] Cf. Hall, p. 98, note.

[2] Cf. L. Q. R. Vol. XXIX. Netherlands South African Railway Case.

tion had been made. A country, as Prof. Westlake has said, cannot pledge the credit of its enemy as well as its own in case of being conquered and annexed. Still less can a country virtually conquered do so for the purpose of carrying on a guerilla warfare. Before the declaration of annexation had been made, but when it was obvious what would be the result of the war, Lord Roberts issued a proclamation that "Her Majesty's Government will refuse to answer any promissory notes issued by the South African Republic on the security of the immovable property of the State that may be hereafter presented for payment, and expressly repudiate all liability in respect of them whatsoever."[1] At the date of this notice, it was reasonable to assume that anybody who pledged his property to the enemy on such security was making a personal contract at an extreme risk; he had only a right *in personam* and not *in rem* whatever the form of his contract, because the Transvaal Government had no longer possession of the land. The conqueror need not recognise such rights against his predecessor which were obtained during war.

The obligation of the conqueror to take up the national debt of the conquered country or province is one of the undecided questions of international law. It is necessary to draw a careful distinction between different circumstances of conquest, for different usages apply in three different cases:—

(1) When the conquering State has completely extinguished its rival;

(2) When the conquering State has acquired only a province from its enemy, and retains this province as a separate fiscal unit;

(3) Where the conquering State absorbs a ceded province into its general political and financial system.

In the first case the ordinary national debt of the State is taken over by the conqueror, saving only his right, already mentioned, of disowning debt incurred for the purposes of war against him. England, *e.g.*, has taken over the old debt[2] of the

[1] Cf. Stoerk, op. cit. Vol. XXXII.

[2] Cf. Transvaal Ordinance, 1903, p. 182.

Boer Republics, amounting to 2,500,000*l.*, and also the deficit of the Transvaal Government for 1901—1902, amounting to 1,500,000*l.*, though as to this she had no liability. At the same time, a conqueror need not change the security of the debt, or pledge his own revenues in any way to meet the claims of bondholders. He is only liable to creditors so far as the assets of his acquisition extend, although those assets may have been seriously diminished by war. The British Treasury did, however, in fact guarantee the Transvaal Loan, which was taken over.

In the second case, again, the conqueror need strictly only assume the local debt of the province, *i.e.*, the debt specifically secured upon its land or its revenues, and this, too, only so far as the assets cover the obligation. Thus, if the interest be secured upon the Customs of the province, and these Customs, which are retained by the conqueror, do not suffice to pay the interest, the acquiring State is not liable for any deficiency. He takes, as it is said, with "right of inventory," provided always that he maintains in the province a separate fiscal system.

On the other hand, he is under no legal obligation to assume the proportion of the general debt of the country ceding the province, which should be borne by it. No doubt moral propriety would urge him to do so, but there is no legal rule to bind him. European conquerors have, during the nineteenth century, several times given effect to the moral claim on them when it suited their interest. After the cession of Schleswig-Holstein in 1866, Prussia divided the general debt of Denmark between that country and the ceded provinces. Italy, in the same year, assumed a part of the Papal debt, proportionate to the Papal territory she had appropriated. But the Italian Government assumed no part of the general debt of Austria after the acquisition of Lombardy and Venetia, but only the local debts of the ceded provinces; and Germany assumed no part of the French national debt after the cession of Alsace and Lorraine in 1871. The interests of bondholders were, however, hardly prejudiced in these cases, as the defeated nation, even with its lessened resources, could meet all its liabilities. It was

different with Peru when, after her war with Chili (1879—1882), she was compelled to give up certain provinces rich in guano and nitrates. Chili was unwilling at first to take upon herself any part of the Peruvian debt, although this debt was partly secured upon these natural products of the whole country. But the United States, which exercises a kind of protecting influence over the South American States, intervened and brought strong pressure upon the conqueror to recognise an obligation which was here almost a legal one.[1] Mr. Frelinghuysen, the Secretary of State, wrote to the United States Minister in Peru: "If Chili appropriates the natural resources of Peru as compensation for the expenses of war, she should recognise the obligations which rest on those resources, and take the property with a fair determination to meet all the just incumbrances which rest upon it."

In the third case the obligation of the conqueror extends to any liabilities secured locally, irrespective of the assets which he takes over. He has changed the nature of the security by changing the fiscal system, and hence he is bound to accept responsibility. The United States Government, which, in the case of Peru, was so eloquent about the rights of national creditors, defaulted itself when it incorporated the independent State of Texas with the Union (1843). This was indeed strictly a case of peaceful annexation, and not of cession or conquest; but the same principles apply. The annexing State abolished the Texan Customs, set up her own fiscal system over the country, and declared that she would reserve the unappropriated lands of the territory to satisfy the demands of foreign bondholders. But these lands proved insufficient, and the English bondholders brought a claim, which was decided upon by a mixed Anglo-American Commission of Claims (1853). The decision of the umpire in the matter was adverse to their claim, but most publicists—among them the American, Dana—recognised that the United States had not fairly met her liabilities. "By the annexation she has changed the nature of the thing pledged, and is bound generally to do equity to the creditor."

[1] Digest of Wheaton, Vol. I. p. 359.

To sum up, we may say that, subject to his right of disclaimer of debt incurred for the purposes of war, a conqueror is bound to take over the general debt in cases of complete subjugation, and the local debt, either without qualification or with right of inventory, in cases of cession of a province. And neutral holders of stock of the conquered country can call upon their Governments to interfere if these liabilities are not accepted by the conqueror. The rights of enemy subjects, whether they belong to the territory ceded or the territory of the ceding State, depend upon the honour and grace of the conqueror.

The State acquiring territory is bound generally to take over the contractual obligations of the previous sovereign to individuals or corporations. But its right to disclaim contracts made directly for the purposes of war, which is stated by the Transvaal Commissioners, seems to be an equitable exception to the rule. The English Divisional Court in 1905[1] refused a petition of right in which a mining corporation of the conquered Transvaal sought to recover from the Crown the value of gold that had been commandeered in contemplation of war by the Boer Government, on the ground that the conqueror had no contractual liabilities at all. Had the decision in this case of the West Rand Central Mines Co. *v.* Rex been given against the company on the ground that the contract claimed upon was one that the conquered State had made for the purpose of carrying on war against the British Government, there would have been little cause for finding fault with it. But it went further than this, and denied the liability of the successor on contracts generally. The English judges, however, seem to have made an unwarrantable distinction when they restricted the doctrine of the immunity of private property in cases of cession or conquest to property situated locally in the annexed country, and held that it did not apply to incorporeal rights or personal rights by contract. They were referred to, and noticed, Marshall, C. J.'s, decision in U. S. *v.* Percheman,[2] where it was said: "The people change their allegiance, but their relations to each other and their rights of property remain undisturbed";

[1] (1905) 2 K. B. 391.

[2] Cf. Snow, p. 22; 7 Peters, 51.

but they held that his words only applied to land property, the subject-matter in question in that case.

The Transvaal Commissioners lay down a better opinion when they say, following the American case U. S. *v.* Soulard, that "after annexation the rights of property remain undisturbed, and include those rights which lie in contract."[1] In that case, which arose out of the cession of Louisiana to the United States, Marshall, C. J., declared that "property is supposed to embrace rights which lie in contract: those which are executory as well as those which are executed." The Italian Government, after the acquisition of Venetia and Lombardy by the Treaties of Zurich and Lombardy, in which it undertook to satisfy all the local obligations of the provinces,[2] gave the widest possible interpretation to its contractual obligations as the successor of the Austrian Government. It offered to consider the compensation for requisitions regularly made by the Austrians as a charge upon the State; and the Court of Cassation at Florence, in March, 1877, held that by public law the State which succeeds to part of the territory of another is bound, *independently of* special convention, by obligations legally contracted by the latter in relation to the territory. In May, 1896, the same Court upheld its previous principle in an action brought against the Ministry of Finance by a contractor for the price agreed upon with the Austrian Government for the execution of certain fortifications round Venice. The practice of Italy shows a most thoroughgoing acceptance of the judicial rule without any saving provisions based on expediency. It is very generous, but it is probably a little ahead of common international usage.

The practice of England, on the contrary, shows a neglect of the juridical rule, combined with a half-recognition of its authority, and is probably a little behind international usage. In the terms of peace between England and the Boers she covenanted to devote 3,000,000*l.* to cover war losses, which included losses by requisition and seizure of property by the enemy State; or, in other words, contracts made by the conquered

[1] 4 Peters' Amer. Report, 512.

[2] Cf. Westlake, International Law, Vol. I. "Peace," and an article by him, "Title by Conquest," in L. Q. R. Vol. XXI.

Government. But Mr. Chamberlain declared, in the House of Commons, that this was "an act of grace without admitting any liability." Finally, there has come the declaration of the Divisional Court that "there is no principle of international law by which, after conquest, the conqueror becomes liable, *in the absence of express stipulation to the contrary*, to discharge the financial liabilities of the conquered State incurred before the outbreak of the war . . . . "—the exact converse of the Italian Court's statement. It should be said, however, that the opinion of English judges is much harsher than the practice of the English Government, which, as has been noted, has acted with peculiar generosity.

The true position of international usage at the present day would appear to be somewhere between the English and the Italian decisions. The guiding principle is that the conqueror who succeeds to the assets of the conquered State succeeds also to its liabilities, especially when they are directly connected with the assets. The maxim "Res transit cum suo onere" applies to State as well as to private acquisitions. But this principle should be qualified by the following exceptions:—"The successor is not responsible for liabilities arising from—

"(1) The torts of its predecessor.

"(2) Contracts for war and the costs of war."[1]

In regard to the mixture of private and public rights which appear in concessions, a different principle is admitted by nearly all publicists. The question of public policy here intervenes, and "their continuous existence depends upon their not being in conflict with the public law and policy of the annexing State."[2] By proclamation or otherwise the successor declares his public law, and calls on concessionnaires to justify their claims before him at some judicial process. He may modify them, if he thinks fit, as the English Commission did with the National Bank of the Transvaal.[3] If they are cancelled, the persons interested are entitled to equitable compensation.

[1] Cf. Richards, in Law Magazine, Vol. XXVIII. p. 129 ff.

[2] Westlake, op. cit. p. 69.

[3] Cf. Transvaal Ordinances, 1903, pp. 195, 352.

And the rule laid down by Hüber is that "if such a corporation is extinguished, the new sovereign, in assigning compensations, must proceed as if it had already existed in his own country and he were now legislating for its suppression." This was recognised by the Transvaal Concessions Commission in its report. By Article II. of its General Principles, compensation is provided for upon this footing; and it was given, *e.g.*, in the case of the Hatherley Distillery Company when its monopoly was cancelled.[1]

The French claim made against Venezuela a few years back, that the conqueror in a civil war cannot confiscate for political offences concessional rights given to a domiciled neutral, cannot be upheld; it represents an attempt of a powerful neutral Government to extract more than its due from a weak conqueror. Legally domiciled neutrals have not better legal rights from the conqueror than enemies. For the purposes of war and conquest rights depend, in the main, upon domicile. The domicile of the neutral makes him liable to the same incidents as the hostile subject, and the conqueror will only recognise towards him the same liabilities as he recognises towards any other inhabitant. He may, however, be better situated than the conquered subject as regards his remedy, inasmuch as any grievance which he urges can be backed up by his Government, whereas the other depends only on the grace of the conqueror. Nor, again, have neutral owners of property in the conquered country, though not domiciled there, any special legal rights. The experience of the Transvaal annexation, indeed, seems to show that special favour may be extended to neutral corporations as regards the contractual rights of semi-public character. It is, perhaps, unwise to regard the action of the English Government towards such corporations as a precedent, because it happened that in several of the cases the membership of the companies affected, which were technically neutral corporations, was largely English. In earlier cases it has been held that the nationality of shareholders does not affect the character of a company and the fate of its property, which are decided by its locality or place of

[1] Cf. Transvaal Ordinances, 1903, pp. 195, 352.

registration (cf. Reg. *v.* Annand,[1] a case under the Merchant Shipping Act). And Mr. Justice Story declared in the last century that "there is no legal difference as to the plea of an alien enemy between a corporation and an individual."[2]

By the old law, then, a neutral corporation which carried on its operations in the enemy country would have been held by domicile to be an alien enemy. But the economical features of the world have changed since then, and make it desirable to pay regard to the real rather than the nominal character of companies in war time. The latest practice points to a change in this direction, but some definite pronouncement upon the position of enemy and neutral corporations in war is much to be desired. The English practice, however, so far as it goes, is instructive. When a concession was not considered to be against the public policy of England, the full succession to the liabilities of the Transvaal Government has been recognised by the new sovereign. Thus the Pretoria-Pietersburg Railway Co., Ltd., was formed to work a railway concession in the Transvaal and incorporated in London, with a capital of 500,000*l.*, of which 300,000*l.* was subscribed by the Transvaal Government, who guaranteed the principal and yearly interest of 4 per cent. The Transvaal Government defaulted in January, 1900, and the British Government took over the shares which it had originally subscribed, and admitted its liability to pay all the arrears of interest due on debentures and shares as from January, 1900, when it was last paid, although the annexation was only made in September, 1900. Again, in the case of the Selati Railway Co., a Franco-Belgian corporation, the English Government took over the liability of the Transvaal Government to redeem the debentures at a certain rate.[3]

The English Commissioners showed a disinclination to press against neutral shareholders the technical enemy character which a company may acquire by being incorporated and

[1] 9 Q. B. 801.

[2] Society for the Propagation of the Gospel *v.* Wheeler, 2 Gallison, 105.

[3] Cf. Transvaal Ordinance, 1905, p. 89.

registered and carrying on its operations in the conquered country. And Lord Lindley stated (*obiter*) in the Driefontein Mines case that, "when we are considering questions arising with an alien enemy, it is not the nationality of the person but his place of business during war which is important." This gives a loophole for liberal treatment to companies which have their offices in England. The needs of modern commerce encourage as lenient a treatment as possible towards limited companies which are involved in the incidents of war, and this consideration will affect future decisions.

It is true that the Transvaal Commissioners held that the property of the neutral shareholders in the Netherlands South African Railway Company had been legally forfeited by the un-neutral service of the company's director in the Transvaal. But this was an extreme case of identification with the enemy which could not be excused. On the admission of their manager, the company officials had made cannon and ammunition, blown up bridges on English territory, and refrained from discharging their staff on commando.[1] "We have been," he said, "*plus royaliste que le roi.*" The Commission held that, in the face of such aggressive action, the rule of confiscation for un-neutral carriage by sea was applicable. It has been objected to this that the confiscation of private property or land is forbidden,[2] but on the other hand it may be urged that if after military occupation a neutral domiciled in the territory helps the enemy, his property is as liable to confiscation as that of any enemy subject, and such confiscation may be confirmed at the end of the war. It seems, then, that the decision of the Commission that the property of the neutral shareholders had been confiscated by reason of aggressive enemy service was good, though no doubt their recommendation to compensate *bonâ fide* neutral purchasers before the outbreak of war or before annexation was equitably necessary. The English Government, at any rate, finally made a full recognition of the equities of neutral shareholders, and paid 135*l.* for each share and each debenture

[1] Cf. Report of Transvaal Concessions Commission; South African Railway Co.
[2] Westlake in L. Q. R. Vol. XXI.

of a *bonâ fide* purchaser for value before the proclamation of annexation.

It has been contended by Sir Thomas Barclay that the English Government was not justified in confiscating the rights of purchasers of shares after that date, because the notice that it would not recognise any alienation of property issued by the High Commissioner in September, 1900, could not be regarded as an effective notice to the world, and because the conquest of the Transvaal was not complete till the Treaty of peace, 1902. But, on the analogy of the notice of blockade to neutrals, the proclamation on the annexation in September, 1900, was good notice to all, and it is impossible to contend that the Transvaal Government was carrying out the duties of a sovereign State for long after this declaration of annexation. England was in *de facto* possession of the whole country, and had the right to declare it annexed. Sales of railway shares by the Transvaal Government after that date come under the class of contractual liabilities incurred for the purposes of war which the conqueror is not bound to take over.

With the exceptions here discussed, conquest to-day does not disturb the private property owned by either belligerent or neutral subjects in the conquered or ceded territory. The rights are not changed, but the remedies are. The new sovereign introduces, if he so chooses, his own laws in place of those of his predecessor, and he may apply the new judicial system to determine those suits which had begun before the outbreak of war. No doubt an enlightened Government will not press this power so as to create injustice, but the bare right remains to him. All rights of action, whether between two subjects of the conquered State, or between a subject of the conquering and an inhabitant of the conquered State, revive as soon as the conquest is complete, but the new Government will not re-open a case finally decided already by the Courts of his predecessor.[1]

The conqueror, too, while recognising all the titles to property admitted by his predecessor, when the person has seisin or

[1] Hay *v.* South African Gold Recovery Co., (1904) A. C. 437.

possession, will compel all claimants to property in the conquered or ceded country to make good their titles according to his own law, and not according to that of his predecessor. Thus in the case of U. S. *v.* De Repentigny, already commented upon, the United States Court held that as they had succeeded by conquest to the sovereign rights immediately of England, and through her mediately to the rights of France in the territory of Michigan, their land laws must be applied to test the validity of a claim originally acquired from the French Government.

Further, the conquering Government will not recognise grants of land made in the territory to which it succeeds by the old sovereign, either to belligerent or neutral subjects, after it has once announced its succession. The case of Harcourt *v.* Gaillard[1] decided that a grant by the British governor of Florida to a British settler, of land within the limits of the old thirteen (English) colonies, which was made after the Declaration of Independence and during the progress of the war in 1777, was invalid and gave no title. The Court declared that the States attained sovereignty by the Declaration of Independence, and applied the general principle that grants of soil in disputed territory made *flagrante bello* by the party that fails can only derive validity from treaty stipulations.

The conqueror may, it is submitted, appoint a date from which he claims to have succeeded to the territory, and he need not give effect to any alienation of land which his predecessor purports to make after this date. This principle will apply not only to land, but to all rights of property whatsoever, and to all contracts, and it forms the complement to the rule that the conqueror will not recognise as binding upon him liabilities incurred by his enemy for the express purpose of carrying on the war. All alienations made after the sovereignty has been virtually changed may be regarded as hostile acts, and therefore invalid against the victor. The English High Commissioner in South Africa issued proclamations in March, 1900, and again in September, 1901, that: "Her Majesty's Government would

[1] 12 Wheaton, 523.

not recognise as valid any alienation of property, whether of lands, railways, mines, or mining rights, within the Transvaal and Orange Free State, and any interest therein of whatsoever nature, or any charge and incumbrance thereon charged or made by the late Government of the South African Republic subsequent to the date of the said proclamation."

The first proclamation may have been somewhat premature, but certainly between March, 1900, and September, 1901, the sovereignty of the Republic had been in fact displaced, and the English forces were in control of the country. There comes a point when the military occupant has the right to declare that he intends to effect a conquest, and to act on that assumption; and he thereupon gives notice that he will not recognise sovereign acts of the enemy within the occupied territory. If we make an analogy between State and individual succession, it must be remembered that the former is not a peaceful but a violent process carried out in strife. The successor need not, and usually will not pay regard to liabilities incurred with private individuals for the purpose of defeating his inheritance, after he has once entered into the process of succession. The treaty of peace only perfects the conquest; the first stage of it was the military occupation.

CHAPTER VII.

WAR AND PROPERTY AT SEA.

Between belligerents the rule is that private property at sea is subject to capture, conditioned by the Declaration of Paris. Capture is legitimate on the open sea or in the territorial waters of either belligerent; and the enemy vessel or cargo is acquired by the captor free of all equities. The Prize Court will not recognise a lien on the freight or bottomry on an enemy ship which would have been effective as against the original owners.[1] The basis of the existing practice is that the object of maritime war is to cripple the commerce and shipping of the enemy as well as to destroy his naval forces. But at the same time respect for innocent private property is shown by its immunity when conveyed in a neutral vessel. The reforms accepted at Paris in 1856 by the Powers, in effect limit capture to the mercantile marine of the foe. For the Declaration prescribes four rules, which are binding upon all the chief nations of Europe in their wars with one another, and curtail the ancient usages of promiscuous capture of enemy property at sea :—

(1.) Privateering is and remains abolished.[2]

(2.) The neutral flag covers enemy goods with the exception of contraband of war.

(3.) Neutral goods are not liable to capture under the enemy's flag.

(4.) Blockades to be binding must be effective; that is to say, maintained by a force sufficient to prevent access to the coast of an enemy.

It is true that a few nations have made treaties mutually abandoning their rights of capture, but the general rule remains as stated; and the rule extends to all private property which has enemy character, whether it is the property of an enemy subject or not. Enemy character depends on domicile, the

[1] The Marianne, 6 C. Rob. 24; and The Tobago, 5 C. Rob. 218.

[2] Under this rule only lawfully commissioned men-of-war of the belligerent State have a right of capture, though voluntary cruisers, which are in reality converted merchantmen, come apparently within the required category.

question being whether there is war with the country in which the owner is voluntarily resident.[1] A person domiciled in a neutral country, though in fact a British subject or a subject of a State at war with England, is regarded for purposes of maritime capture, and in fact for general commercial purposes, *e.g.*, for the right to trade with the enemy, as a neutral.[2] Commercial domicile for war purposes is distinct from civil domicile. The latter requires such a permanent residence in a country as makes that country the person's home. The former is such a residence in the country for the purpose of trading as makes his trade contribute to, or form part of, the resources of such country.[3]

The difference presses hardly upon the neutral merchant. In war a man is taken to be domiciled in the country where he in fact resides, the two salient facts being (1) "factum manendi," (2) "animus manendi"; he must prove affirmatively that he has the intention of not continuing to reside there.[4] "The character gained by residence ceases by residence. It is an adventitious character which no longer adheres to him from the moment that he puts himself in motion *bonâ fide* to quit the country *sine animo revertendi*." On the other hand, the American and the English Courts have held that a citizen cannot by emigration from his country during hostilities acquire such a foreign domicile as to protect his trade during war against the belligerent claims either of his own country or of a hostile power.[5] And, further, a subject resident in the enemy country must withdraw his property from there within a short time after the outbreak of war, if at all, or it will be confiscable by the cruisers of his own State.[6]

The Anglo-American practice is very rigorous in every direction. It has been held by the United States Courts that the share of a partner in a neutral house is subject to confiscation when his own domicile is in a hostile country ("The Antonia Johanna"[7]), and that the property of a house of trade established in the enemy's country is condemnable whatever may be the personal domicile of

[1] Albrecht *v.* Susman, 2 Ves. & B. 323.
[2] Bell *v.* Reid, 1 M. & S. 726.
[3] The Harmony, Snow, p. 32; 2 C. Rob. 322.
[4] The Indian Chief, Snow, p. 315; 3 C. Rob. 12.
[5] The Dos Hermanos, 10 Wheaton, 310.
[6] The St. Lawrence, Snow, p. 290; 8 Cranch, 434.
[7] Snow, pp. 336, 337; 1 Wheaton, 159.

the partners. ("The Freundschaft."[1]) The judgment in the English case of "The Vigilantia" (1798), is to the same effect.[2] Further, in the case of Bentzen *v.* Boyle,[3] the American Court condemned the produce of the soil in the military occupation of the enemy, though the owner of it had a neutral domicil. Here they followed the rule of Lord Stowell, "That the possession of the soil does impress upon the owners the character of the country, whatever the local residence of the owner may be." The usage seems very hard upon the neutral owners; and the law of enemy character, like the law of trading between enemy subjects, is in many ways obsolete, and not applicable to modern conditions. The property of a neutral in an occupied territory is subject on land, according to the old cases, to the requisitions of the occupant; on sea, to capture by the other belligerent, because its fate is determined by its locality and actual commercial quality respectively, and not by the nationality or the personal intentions of the owner.

It is, however, an inconsistent piece of harshness to condemn the property of an enemy after the port or country from which it comes, or to which it is consigned, has fallen into the military occupation of the belligerent who seizes it; but in the case of "Danckebaar African,"[4] Lord Stowell did condemn a vessel belonging to Cape merchants captured after the conquest of the Dutch colony by England, on the ground that the ship, having sailed as a Dutch ship, could not change her character on the voyage. In those days belligerents pressed their rights up to and beyond the letter of the law, and this is always the tendency during the stress of war. But the rules of 1856 greatly lessen the risks to-day, and the abolition of privateering removes to a large extent the basis of the old severity.

The French rule about enemy character is less severe upon neutrals than the English. In the old case of "Le Hardy"[5] (An IX.), it was held that a neutral merchant domiciled in a belligerent country does not thereby acquire a belligerent character, and his property at sea is neutral property. The

[1] 4 Wheaton, 105.
[2] 1 C. Rob. 1.
[3] Snow, p. 331; 9 Cranch, 191.
[4] 1 Rob. 107.
[5] Snow, p. 337.

principle of nationality is given a wider application on the Continent than it receives in England, and it determines the status of the subject in war as well as in peace. England maintains the old principle that domicil may change character as well in public as in private international law; but the Latin races lay stress mainly on the national tie, and confiscate the goods of their own nationals, though domiciled in neutral countries.[1] As a counterbalance to their indulgence to neutral commerce coming from the enemy country, may be set the rigorous French usage which refuses, once war has been declared, to recognise any transfer of a vessel from a belligerent to a neutral owner. The English custom is to respect it if a *bonâ fide* sale can be proved to have taken place to neutral owners, but the onus of proving this clearly is on the transferee.[2] The flag is the general test of the enemy or neutral character of the ship, but the manning and employment of a ship and the fraudulent character of the transfer may stamp it as enemy despite its neutral flag. In general, then, the flag is final evidence against a ship, but not final evidence in its favour, and the captor may go behind it.[3] On the other hand, where the subjects of non-littoral States, *e.g.*, Switzerland, have been compelled to navigate under the flag of another State, the flag will not necessarily condemn the vessel if the owner can prove their neutrality. Thus, the French Conseil d'Etat, in 1871, released the "Palme," a vessel belonging to the Missionary Society of Basle, which had been brought in flying the German flag, because the Swiss had no flag of their own, and the vessel was genuinely neutral property.

While the old practice of capture of enemy property still prevails on the sea, certain mitigations have been introduced. In the first place, the embargo, which used to be laid upon enemy shipping within the ports of the other belligerent at the opening of war or in contemplation of it, has now been practically abandoned; and belligerents regularly allow a certain

[1] Cf. Despagnet, Droit International Public, p. 652 ff.

[2] The Jenny, 4 Rob. 31; The Omnibus, 4 Rob. 71; and a late case in the Spanish American war, The Benita Estanger, 176 U. S. Reports, 568.

[3] The Johanna Emilie, Spinks' Prize Cases, 14.

period of grace in which merchant vessels of the enemy may load their cargo and depart. At the outbreak of the Crimean war six weeks were granted, the Ottoman Porte giving the lead to the European powers by refusing to lay an embargo against Russian shipping in her declaration of war. The French, in 1870, allowed German merchants one month; the Americans, in 1898, gave Spanish vessels the same time; but the Spanish only allowed their enemies five days. The Japanese, again, allowed Russian merchants one month in 1902, while the Russians only gave their opponents three weeks.[1] But though it is possible the period may be even more limited in future, the practice itself may be taken as having received that general consent which changes the law of nations. It follows from the general principle that capture must not be wanton or based on any right of spoliation, but only enforced by way of penalty.

In the second place, in-shore fishing-boats are exempt from capture. Lord Stowell, the English authority, held that the exemption is a matter of comity only and not of right, and it might be annulled in case of necessity, *e.g.*, if a foreign power proposed to use trawlers as transports. The English practice varied according to circumstances in the Napoleonic wars.[2] Nevertheless, the general freedom from capture is conceded, and in a late American case, "The Paquete Habana,"[3] arising out of the Spanish-American war, it was held to have passed into the law of nations. Deep-sea fishing-boats have still no immunity. Private vessels of discovery or engaged in scientific exploration are by custom immune, and hospital ships or any engaged in tending and transporting the sick are so by the Geneva Convention, as extended to the sea. A movement is growing up for extending immunity to regular mail-boats; a convention between England and France, in 1903, prescribed it as between the two nations, but recognised the right of either to rescind the immunity upon giving notice to the other. The general comity of nations demands the extension of this privilege, and no doubt the future will see the immunity of mail-

[1] Cf. Lawrence's War and Neutrality in the Far East.

[2] Cf. The Young Jacob and Johanna, 1 Rob. 20.

[3] 175 U. S. Reports, 677.

steamers from both search and capture, provided, of course, that they are carrying out their proper functions. In the Spanish-American war the United States Court properly condemned a Spanish mail-boat, the "Panama," which was fitted up as a man-of-war, and was ready to be turned into a cruiser.[1]

It is now clearly understood that enemy vessels may not be captured within the territorial waters of a neutral; though the capture is good as between belligerents, it is the duty of the neutral to protest against a violation of its sovereignty.[2] Nor, again, may a belligerent vessel moored in neutral waters send out an expedition to capture.

It was one of the pious "vœux" of the Hague Peace Conference of 1899 that the abolition of the capture of private property at sea should be considered at the next Conference, and the question will certainly be one of the main subjects of discussion at the forthcoming meeting.

It cannot be denied that the movement for abolition has gained great favour upon the Continent, and that it is the continuous opposition of England to the change which is the main obstacle to its success. At Turin in 1882, the Institute of International Law passed a resolution against the retention of the present practice by ten votes to seven; at the Hague in 1899, although the English delegation protested, the resolution was actually passed without any division at all. And Nys, De Maartens, von Bar, and Despagnet, to mention but a few of the most considerable living writers on international law, strongly advocate inviolability. The opinion then of the publicists may be taken to be steadily increasing in favour of the proposal, but the progress of practice in this direction is less marked. In the two last important wars between leading sovereign States, *i.e.*, in the Spanish-American and the Russo-Japanese wars, the private property of the enemy was regularly captured and condemned, when found upon enemy merchantmen.

The exemption from capture was, it appears, first mooted by a French publicist, L'Abbé de Mably, who wrote in the middle of the eighteenth century, and based his thesis mainly upon

[1] 176 U. S. Reports, 535.

[2] Cf. The General Armstrong and The Anna, Snow, pp. 393—398; and The Twee Gebroeder, 3 Rob. 339, 340.

considerations of expediency. The originator of the movement in practical politics was the American statesman, Benjamin Franklin. In the treaty of peace made between England and the United States in 1783, he urged the inclusion of a clause that merchant ships of the two countries in case of future wars should pursue their voyages unmolested. Great Britain refused, but Franklin was successful in the following year in making a treaty with Prussia including a clause to this effect. The French National Assembly of 1792, which had declared the modern conception of war in its relation to private property generally, voted in favour of a similar measure, and invited the powers to enter into agreements according to its principles. The United States, Hamburg and the Hanseatic Towns announced their adhesion; no other States returned an answer.

The Revolutionary and Napoleonic wars showed no mitigation—to say the least—of the old practice, and the treaty between America and Prussia remained till the middle of the nineteenth century the sole example of the new view; and seeing how remote was the possibility of war between the two powers, it was of sentimental rather than of practical value. The United States Government has, however, steadily agitated against the capture of private property at sea, and urged their protest vigorously but unsuccessfully at Paris in 1856. They refused to assent to the abolition of privateering till the larger proposal was adopted. Their theory has remained constant, but their practice in the Civil War, 1862—65, showed that when their own self-preservation was in question, they were prepared to extend to its farthest point the regular law of capture. Similarly Napoleon, who declared that "belligerents ought to wage war without giving rise to the confiscation of their mercantile marine," imposed the Berlin and Milan decrees to bring England over to his view! And he stretched the penalty of confiscation against English commerce far beyond what the law allowed. The only occasions when the old law has been relaxed in actual warfare, have been when maritime capture played, or would have played, an insignificant part in the struggle. After the Schleswig-Holstein war between Germany and Denmark, the 13th article of the treaty of peace

provided for the restoration of or compensation for private vessels captured. By Article 3 of the Peace of Zurich, 1859, France restored any Austrian vessels which had not yet been adjudicated upon by her Courts. During the hostilities themselves of 1866 between Austria and Italy, innocent property was regarded as inviolable at sea, but this is the first and—save for the one-sided action of Prussia in 1870 (when she had nothing to lose by it)—the last instance in practice. Italy, which has become the European champion of the doctrine, made a treaty in 1871 with the United States establishing the usage between them in case of war, but the treaty has not been put to the test. The same country, too, in her marine code of 1865, declared that the capture of mercantile vessels of hostile nations was abolished wherever a State would give reciprocity of treatment. In the last fifty years a vast amount of literature and an endless number of resolutions have been passed by parliaments, legal associations and chambers of commerce in favour of the change; but in the Franco-Prussian (on one side) and the Russo-Turkish wars, as well as in the latest struggles that have been mentioned, the old usage was resumed.

Such being the practice, let us examine the theory advanced to recommend that private property at sea, unless it be contraband, should not be liable to capture. It is argued, in the first place, that the modern idea of war recognises the inviolability of private property on land;—in the words of the Brussels Declaration, "La propriété privée doit être respectée": —and that it is unreasonable to make a distinction between military and maritime warfare. To this it may be replied, that even under the new Hague laws of war, requisitions, or contributions in lieu of them, are permitted to the land belligerent, and also the seizure of property immediately useful in war. Now the private vessels of the enemy are objects immediately useful for war, and as the military occupant is in fact allowed to requisition all means of locomotion, so it is equitable that the belligerent on sea should be allowed to capture and utilize all the ships of his enemy. If the ship is captured, the cargo must be detained; and if the enemy cargo is useful to the captor, it may fairly be seized by him, as it would be by a land army.

When it is not useful in itself, there is some logical reason from the analogy of land war for sequestrating it instead of condemning it, though practical objections may be raised to this course. But this is the only change in the present usage which can fairly be demanded from the parity of sea and land argument. It should be noted also that whereas property on land is for the most part useless for a hostile purpose, property at sea is almost always merchandise, and thus part of the enemy's strength.

Then, it is said, requisitions, etc. on land are excused by military necessity; maritime capture implies a wanton attack upon private property. Now this argument, as Captain Mahan points out, involves a confusion of ideas arising out of a play upon words which entirely vitiates it. The play of words is upon "private property," which means one thing when applied to war on land and another when applied to capture on sea. Private property fixed locally and at a standstill is one thing; private property upon ships and in process of transportation is another. It is in the latter case not only private property but also a part of the national commerce, and it is in this, its national character, that it is confiscated. It is exactly equivalent to money in circulation, and it is the life-blood of a nation's prosperity, upon which, in the end, war depends. "It is national in its employment, only in its ownership is it private."[1] This is the crux of the whole question, and it should be fairly recognised that maritime capture is directed not against private property but against *national commerce*. Further, it is rather to be regarded as forfeiture than as seizure, as penalty more than as pillage. The enemy subject has full warning not to carry on his commerce, and he does so voluntarily and well knowing the risk which he runs. If, in order to increase his own wealth and the resources of his country, he runs that risk, he must expect to suffer the consequences when he is intercepted. On land no less than on the sea the belligerent endeavours to strike at the commerce of his opponent and to cut off his communication with the neutral world. He seizes or destroys rail-

[1] Mahan, "War of 1812."

ways, he blocks the main roads, and he primarily occupies enemy territory to prevent internal as well as external commerce. Maritime capture is a corresponding right at sea, not inconsistent with the inviolability of private possession on land.

It has been argued that the modern practice of granting days of grace to enemy traders at the outbreak of war, within which to leave the ports of the other belligerent or to deliver their cargo there, makes the subsequent maritime capture inconsistent. But this argument betrays the misunderstanding which lies at the bottom of the question. To confiscate in the first case would be to seize private property for its own value, and in order to cause loss maliciously to the enemy; to confiscate in the second is to penalise the commerce of the enemy after fair warning to the subjects has been given. Then it is said that the practice is valueless to a modern belligerent, creating injury to individuals without gain to himself. This, no doubt, is a question for naval experts, and Captain Mahan, at any rate, holds that commerce-destroying, regarded as a secondary operation to the destruction of the enemy's war-fleet, is justified by the experience of centuries; and the immense depredations of the "Alabama" support his view. "To sap the prosperity upon which war depends for its energy is a measure as truly military as is killing a man whose army maintains war in the field."

Attention also may be called to the lavish bounties with which Continental Governments foster the growth of their mercantile marine. If they, in peace time, regard the prosperity of their shipping as so important for the country's welfare, surely an enemy may claim that the destruction or the crippling of that shipping is a vital blow.

But it is argued on the other side that the Declaration of 1856, by which enemy property under a neutral flag is immune from capture unless it be contraband, has taken all the value out of commerce-destroying by sporadic maritime capture. The enemy's commerce, it is said, will go into neutral ships, and the right of maritime capture will be of small value to a strong naval power. No doubt there is something in this assertion, and the old conditions, when the operations of maritime war

were compared to a flight of carrier pigeons pursued by a flight of hawks, have passed away. At the same time it must be remembered that the transference of commerce in this way is not an easy thing to carry out, and to a nation with a large sea-borne trade only partially possible. Moreover, the carrying out of such a change to avoid capture would involve the country in a great loss and would reduce its commercial power; and in this way the reserve of the potential right to capture would have assisted the other belligerent. If he was successful again in frightening off the sea his opponent's commercial marine, he would then be able to concentrate his forces upon a blockade of his coasts, and the experience of the last century shows that blockade is the more oppressive and the more effectual method of warfare.

This suggests an objection of a different kind to a change in practice. There can be little doubt that the abandonment of maritime capture of enemy's property would lead to an extension or a greater application of the right to blockade, and this involves a greater restriction upon neutral as well as upon belligerent trade. The Paris Rules of 1856[1] have already led to considerable extension of the usages of capture for contraband. If a Hague Convention abolished the right of maritime capture, we may be sure that belligerent exigencies would call into being some new compensatory device to redress the balance against commercial freedom. Some of the supporters of the immunity (*e.g.*, Signor Ferrato[2]) are prepared to allow a belligerent to seize enemy merchantmen for his service, and to destroy them when military operations render it necessary. But to abolish a law in order to introduce the principle of necessity, which really knows no law, is hardly a forward step. "Ohne Hast Ohne Rast" is the golden rule in international law, and when theory gets ahead of practice, there is danger of an extreme revulsion. The experience of the world has hitherto shown that a strong naval power has a powerful commercial marine; and as long as that is so, a war between two naval powers will involve an attempt to destroy their sea-borne trade. If the right of

[1] See next chapter.

[2] Article in the Political Science Quarterly for 1905.

maritime capture is prohibited, some perhaps more "barbarous measure," such as blockade by mines, will take its place. Lorimer has pointed out that the present usage is the least inhuman act of war, because capture is nearly always bloodless and losses are spread over the whole community owing to their being covered by insurances.[1] This opinion was upheld two years ago by the present Lord Chancellor, who, though in favour of the proposed reform, admitted that "no operations of war can inflict less suffering than the capture of unarmed vessels at sea."

The proposed immunity would really give an unfair preference to marine over land trading; for on land, as has been shown, an invading and occupying army effectually prevents internal trade. In this connection the words of Lord Selborne when, as Solicitor-General, he opposed the principle in the House of Commons in March, 1862, are worth quoting. "He dreaded to think what might be the effect of admitting the principle of a political war and a commercial peace. If anything could sap the patriotism of a nation, it would be such a state of things. If a system of war were introduced which would admit of carrying on war without burdens, could it be supposed that the interests of merchants would be the same as now in preventing war or in bringing about the restoration of peace?"

The right to capture enemy property at sea corresponds with, and is supported by, the same reasoning as the right to forbid commerce between enemy subjects. In either case the belligerent is aiming at the commercial prosperity of his enemy and not at the property of individuals; he applies his sovereign rights to his own subjects and belligerent rights to the subjects of the enemy. But the two powers must logically stand or fall together; and the proposed change would legalise all trading between belligerents save contraband.

Apart from the general moral and legal sides of the question, it may be argued that England has more to gain than to lose by accepting the proposal of continental publicists. It is repeatedly represented that we stand to suffer most severely in

[1] Cf. Revue du Droit International, 1883.

a great war with maritime powers under the present rule of capture, because of our dependence for our food supply upon sea-borne trade and because of our enormous mercantile marine, which is far greater than that of any other nation. And it is said that if war broke out "there would immediately be a wholesale transfer of British mercantile shipping to neutral flags," which would mean the loss of our carrying trade. Professor Westlake,[1] however, has shown how difficult such a course would be, and how unlikely to be carried out. Still, it may be admitted that this country, having the largest mercantile marine, runs the greatest risk by adhering to the present rule. But what the advocates of the change have to prove is that we would suffer less risk if it were made. That is not at all clear. Until the nations have made some common declaration about contraband, it is always possible, and even probable, that a power fighting against England would declare all provisions to be contraband; and then our food supply would be even more endangered than it is now, for it could be confiscated on neutral as well as national ships. Again, it cannot be denied that the change will increase the chance of blockade, setting free as it would the swift cruisers on either side from the duty of watching the trade routes; and although England might gain something by increased powers of blockading, her small coast-line, compared to that of the other great maritime powers, and her complete dependence upon her sea-borne trade, render blockade—even partial blockade—a far more pressing danger to her than any nation. The intentions of foreign publicists may be excellent, but the support of the change by foreign Governments is based only upon interest, and should therefore be regarded with circumspection.

Professor Westlake thinks that England at the commencement of a war might offer her enemy to enter into a convention terminable on short notice "for mutual abstention from maritime capture, except under the heads of blockade and contraband."[1] One cannot take exception to such a moderate proposal, and the convention on similar terms which has been made with France

[1] Principles of International Law, pp. 252, 253.

to refrain from seizing or searching mail-boats is a good precedent for such a course. But, as a general rule, both from a moral and from a practical standpoint, England is justified in adhering to the present rule. However, one modification may be suggested. When the captured ship and cargo are not actually required for the service of the State, they should be sequestrated and not confiscated, as is the habit already in pacific blockades. When they are required, they may be taken by the State in the same way as contraband is taken, either by confiscation or pre-emption. But, in other cases, the whole purpose of the capture, which is to stop the commerce of the enemy, is served by confiscation of the ship and detention of the cargo till the war is over; and the loss thereby incurred by the owner may be considered a sufficient penalty and a sufficient deterrent for his hardihood. The present custom of dividing among the captors the proceeds of sale after adjudication by a Prize Court preserves in maritime war that taint of belligerent greed and of interested attack upon private property, which is against the spirit of modern warfare, and which has been declared illegal in land operations. It would be unfair to give sea-borne commerce a complete immunity which land commerce does not possess in war; but, on the other hand, it is undesirable to inflict losses upon private owners which are not justified by the necessities of war. And if it is found to be impracticable to detain the enemy cargo for a long period, then the State might give the owner the proceeds of the sale at the end of the war, provided his goods were innocent and his vessel unarmed. The old penalty would be kept for any aggravated case not complying with these conditions.

When this indulgence on the part of the captor's state is considered impracticable, and when vessels and cargo at sea are confiscated, it would seem consistent with general principles that the State whose citizen has suffered should compensate him for his loss, which has been largely incurred on behalf of the whole body.[1] There is at present not so much practice in this direction as is the case with losses on land. The French

[1] Cf. Chapter IV.

Legislative Assembly of 1792, which passed the resolution advocating the abolition of maritime capture, also proposed to indemnify private owners for the losses they suffered through the capture of privateers. But the proposal was not carried into effect. A more reasonable proposition has been mooted by Lorimer: that the captor should give the captain of the captured vessel a receipt which the Government of the owner would honour as soon as the prize was adjudicated. This would invest maritime capture with the same character as the impost of requisitions and contributions on land, and in default of the more liberal change suggested above, would bring the usages of war on the sea into closer correspondence with the usages on land. The Report of the English Royal Commission upon our Food Supply in Time of War,[1] published last year, recommends the principle that the State should indemnify its subjects for the losses they may suffer in maritime war. It considered several proposals: that the State should (1) either insure all merchantmen itself, or (2) pay an indemnity upon all losses, or (3) that it should pay the premium for war risks to the insurance company, or at least give a guarantee to the proprietor of the cargo and make the shipmaster insure his vessel; and it came to the decision that national indemnity was preferable to national insurance.[2]

Some action of the State upon these lines seems desirable, not only to keep down prices of food in war, but also to maintain the carrying trade, in view of the growing practice of belligerents of destroying their enemy prizes, which often contain the property of neutrals as well as of enemies. If the Government undertakes the insurance or the indemnity against war risks, neutrals as well as subjects will be less anxious to withdraw their trade from belligerent bottoms, and so war will involve a smaller loss to the carrying trade of the country. That a captor has the right to sink an enemy vessel cannot be doubted, though it is always preferable to bring it in for adjudication. But the property of an enemy vests in the other belligerent as soon as the capture is made; his conquest is then and there

[1] Parliamentary Papers, 1905.

[2] Ibid. Report, p. 62.

complete, though it may be reversed, if it is retaken, in favour of the original owner. But the captor can do what he wills with his own. In the words of Lord Stowell, the captors cannot properly permit "enemy's property to sail away unmolested. If impossible to bring in, their next duty is to destroy enemy property."[1] During the Crimean war, Dr. Lushington declared (*obiter*) that "it may be justifiable or even praiseworthy of the captors to destroy an enemy's vessel."[2] But both he and Stowell held that compensation must be paid, if neutral property on the vessel be destroyed in such circumstances. The French Government, however, in 1871 refused compensation to neutral owners of cargo on board the two German ships—the "Ludwig" and the "Vorwärts"—which had been destroyed on the ground of necessity of war. When there is a question of real necessity, *e.g.*, when the prize is not navigable, such a plea may be valid; but when it is a matter of convenience, it would be unjust to refuse compensation to the neutral owner: for destruction cannot then be considered an inevitable incident of war. And owing, as Hall points out, to the wide range of modern commerce, the inability of modern cruisers to spare prize crews, and the growing indisposition of neutrals to admit prizes within their ports, convenience and self-interest are continually inducing belligerents to exercise more frequently their rights of destruction, instead of bringing vessels in. The Institute of International Law in 1883 drew up rules for regulating the practice which are fairly wide; but it may be doubted whether a belligerent in the future will consider himself bound by them. The considerations urged by the United States Government in 1812 in the directions to their officers[3] apply with greater force to-day: "A single cruiser, if ever so successful, can make but few prizes, and every prize is a serious diminution of force; but a single cruiser destroying every captured vessel has the capacity of continuing in full vigour her destructive power, so long as her provisions and

[1] The Felicity, 2 Dods. 383. [2] The Leucade, Spinks, 221.

[3] Quoted by Hall, p. 457. The Report of the Commission already referred to recognises this new departure in naval war, and partially justifies it.

stores can be replenished either from friendly ports or from the vessels captured."[1]

So far from disappearing, commerce-destroying, indeed, has been carried out in its full severity in all recent naval wars, and this itself suggests that the agitation for its abolition is in reality somewhat hollow. Even if it achieved a formal success, some extension of belligerent rights in another direction would place enemy commerce under its old disabilities. The Declaration of Paris, which exempted neutral goods under an enemy flag from capture, has been followed by the practice of prize-destroying; necessities of war would probably follow in the wake of legal exemption of enemy vessels. It is urged by Professor Von Bar that the reform lies along the line of development of culture, because the present practice produces great disturbances without directly influencing the issue of war.[2] But civilisation and humanity can hardly demand the abolition of a custom which inflicts losses on enemy subjects that are diffused through the State without causing suffering and bloodshed. And though it may be true that the commerce of the world to-day is a very sensitive organism which feels the blows struck at any member, and that neutrals are often involved in captures of enemy vessels, neutral traders have not on this account any better right to enjoy immunity during belligerent operations at sea than they have on land. On land they accept, perforce, the disturbances caused by war; on sea, provided no unnecessary outrages are committed upon their own merchandise, they must do the same.

The modifications required in the existing practice of maritime capture seem, therefore, to be—

(1) The abolition of prize-money;
(2) The acceptance by the State of its obligation to recoup its own citizens for their losses by sea;
(3) The relaxation of the old laws of enemy domicil by the English and American Courts,[3] and the general

[1] The constant practice of the Confederate destroyers in sinking their prizes during the Civil War fully substantiates this remark.

[2] Cf. Die Nation, December, 1906.

[3] See Appendix II.

adoption of the French standpoint, not on logical reasons, but from comity to neutrals;

(4) The acceptance by the State of its obligation to compensate neutral owners, when innocent cargo is destroyed on an unarmed enemy vessel;

(5) The exemption of mail-steamers from capture; and

(6) Most important of all; the classification of contraband by an international body.

With these changes maritime war would be at least as humane and as respectful of the private property of enemies as war on land, and beyond that it cannot be fairly claimed that it should go.

CHAPTER VIII.

WAR AND THE PROPERTY OF NEUTRALS (HISTORICAL).

The true idea of neutrality was late in developing, and the duties of neutral States, as well as the rights of neutral subjects, though now the most certain part of international law, were the last part to be formulated. The law of neutrality cannot exist until a permanent body of sovereign States has been established, which exerts a definite common opinion upon its members; and it cannot be properly secured until the peaceful commercial intercourse of nations is as important as their belligerent intercourse. These two conditions were not satisfied before the eighteenth century, and hence the law is largely the growth of the treaties and practices of the last two hundred years. It owes very little to what is the root of the greater part of international jurisprudence—Roman law. In the great world-empire of Rome, outside of which were only barbarian tribes, no proper doctrines of neutrality could grow up. When there was war, the whole civilised world was involved, and the maxim upon which the Romans acted was: "Who is not for me is against me." The one doctrine which they developed at all jurally was the prohibition, even in times of peace, of certain kinds of trading with their enemies, the analogue of the modern law of contraband. Grotius quotes the dictum of Justinian: "In hostium esse partibus qui ad bellum necessaria hosti administrat." And the forty-first article of Justinian's Code runs: "Ad barbaricam transferendi vini et olei et liquaminis nullam quisquam habere facultatem ne questus quidem causâ aut usus commerciorum."[1] Then follow prohibitions of traffic in arms and war implements: "Perniciosum namque Romano imperio et pro-

[1] Quoted in Mr. Atherley-Jones' "Commerce and War."

ditioni proximum est barbaros quos indigere convenit telis eos ut validiores reddantur instruere."

The penalty for the violation of the law was the proscription of the offender's goods and, in certain cases, capital punishment. Similar articles appear in the Constitutions of Valentinian, Gratian, and Honorius. The Roman law of trading with enemies was really more akin in effect to the prohibitions of modern European States against importing certain articles into native areas than to proclamations of contraband issued by belligerents to neutral powers, but it formed a prototype of these latter documents. The policy of the Emperors was followed by the Popes in regard to the Saracens, and the Lateran Council promulgated a canon in the twelfth century excommunicating those who supplied the infidels with arms and money. And in the fifteenth and sixteenth centuries belligerent nations began habitually to specify, at the outbreak of war, the kinds of commerce which they would confiscate if they captured it on its way to the enemy; a custom which took the place of a total prohibition of trade that they had in earlier times endeavoured to impose upon all neutral nations.

It was on sea that neutral States first began effectively to provide for their proprietary rights. The sea is the great highway of all nations, and as soon as commerce had begun to establish itself in the mediæval society, it was felt to be impossible to allow the piratical captains of belligerents to work what havoc they pleased on the trade of all other peoples. In all civilised ages there has been a customary international law upon the sea in peace, and so the conception of a law in maritime war was made easier. Hence it is that the rules which regulate the relations of belligerents and neutrals deal almost entirely with sea-borne commerce. On land little difference is made between enemies and neutrals.

From the eleventh century the independent city-States of the Mediterranean banded themselves together to resist the pretensions of belligerents, and, borrowing probably from the old maritime laws of the Rhodians, framed a code of customs to regulate the relations of belligerents and neutrals over the Mediterranean Sea. The most famous of these collections of

customs was the Consolato del Mare, formulated by the jurists at Barcelona in the thirteenth century, and applied by a Consular Court established at Barcelona 1279. They were first printed in 1494, and were soon translated into the chief European languages; but they had been spread among the chief nations before then. The two most important rules of the Code were:—

(1.) If the captured vessel was neutral and the cargo enemy, the captor might compel the vessel to carry the cargo to a place of safety, paying her the freight she was to have received from the owner of the goods, but could not confiscate the vessel.

(2.) If, on the other hand, the vessel was enemy and the cargo neutral, the owners of the cargo might ransom the vessel from the captors, and, if they refused, the captor could send the vessel to a port of his own country and make the owners of the cargo pay freight. The logical principle upon which these rules were based was that the fate of the goods depended on the character of the owner. In theory these rules prevailed until the eighteenth century, but in practice they received scant regard in the violent usages of war, and that, too, despite the institution of Prize Courts which were set up in maritime countries in order to make better provision for the rights of neutrals than the Consolato directed. Instead of holding his enemy prize to ransom or sending his enemy cargo to a place of safety, the privateer brought in his prize to be adjudicated by a national Court, which was supposed to apply the common maritime customs, and decreed the fate of the vessel or the cargo.

In the seventeenth century, the law of contraband trading began to be defined; and by a series of treaties and proclamations some kind of rule was introduced to determine which articles were allowed to be carried by neutrals to the enemy, and which the belligerent would hold confiscable. The word contraband is first used in its modern sense in the Treaty of Southampton in 1625 between England and the United Provinces; and Grotius, though he does not know the word, has set forth a full doctrine of the thing. He recognises the clashing exigencies of neutral trade and belligerent necessity,

and divides all goods for the purposes of war into three classes:—

(1.) Things used only in war, *e.g.*, arms which the belligerent may always prohibit and confiscate in case of capture.

(2.) "Res ancipitis usus," or ambiguous articles useful both in war and peace, among which he places ships and provisions, which a belligerent may prohibit according to the condition of the war. If their detention is necessary to his safety, the belligerent may detain them, though Grotius holds that he should only sequestrate, and not confiscate, articles in this category.

(3.) Things useless in war, as articles of luxury, which the belligerent may not prohibit or confiscate.

Grotius left it to Vattel to found an exact science of neutrality, but by his doctrine of contraband he made a most important contribution to this branch of International law. England has consistently followed his threefold division of goods and his directions upon them, though she has varied considerably the context of his three classes. She has extended the first class cover to things not used in, but only useful for, war, *e.g.*, naval stores; and she has regarded the second class as legally a proper subject for confiscation instead of mere detention, though as a matter of practice she has frequently resorted to pre-emption or purchase at a fair market rate.[1] Other nations, however, of which France is typical, have recognised only two classes of goods in their relations to neutral traders:—

(1.) Goods absolutely prohibited, and always confiscable.

(2.) Goods allowed, and never confiscable.

But this has not implied any greater respect for neutral trade than the English usage; rather, it has involved a more complete interference with it, because the list of absolute contraband has been greatly enlarged by these nations, when belligerent, to suit their convenience.[2] From the seventeenth century it has been the practice of belligerent nations to issue at the beginning of war a list of the goods which it intended to regard as con-

[1] The United States and Japan follow the English practice, and recognise three classes of goods in war.

[2] Cf. Hall's International Law.

traband absolutely and, where such a class was admitted, conditionally. Unfortunately, however, no custom grew up fixing the character and range of contraband; the lists of each nation varied from war to war, and neutrals were unwilling or powerless to protest for fear of restricting their own rights when they themselves became belligerent; or causing a complete prohibition of trade, such as was still at times resorted to.

When this extreme measure of belligerent interference with neutral trade came to be viewed with disapproval, it was modified into the practice of blockade, which began to take definite form in the seventeenth century. Blockade is a total prohibition of trade with the enemy, limited by time and space; and it can be supported by the plea of military necessity, so that it is not contrary to modern conceptions. It has been defined by Lord Stowell as a "maritime circumvallation round a place," and it corresponds very largely to the siege of a town on land, and is ensured and enforced by the same methods, the presence of a sufficient force to make ingress and egress perilous. In the first stages, however, of the development of the practice, the belligerent power was apt to turn blockade into a general restriction of trade. In 1630, the Dutch issued a notice that all ports in the Netherlands remaining to the Spaniards were deemed to be besieged, though in fact they were not. When the rights of neutrals were more thoroughly appreciated, it was demanded of belligerents that they should not exclude neutral commerce unless they possessed a sufficient naval force to prevent adequately access to the ports. But during the seventeenth and eighteenth centuries, "paper," or fictitious blockades, were the rule rather than the exception, and the belligerent claimed the right of prohibiting trade when he only had the power of terrorising neutrals without that of effectually cutting off communication.

The Dutch, who had developed the doctrine of blockade, popularised about the same time another doctrine which, on its face, was a relaxation of the old rule towards neutral property; but, in view of the practice of belligerents to omit during hostilities all relaxations and press all severities, it veiled a further means of attack and a retrogression to the old spoliation.

At the beginning of the seventeenth century they were the carriers of the world; and in the interests of their trade they made frequent conventions with other States to substitute for the old rules of the Consolato del Mare the twin maxims: "Free ships, free goods," and "enemy ships, enemy goods." They were indeed, in theory, an amelioration of the extreme belligerent practice exhibited in the French Ordonnances of 1538, 1543 and 1584, by which not only were enemy goods confiscated on neutral vessels, but their presence infected the vessel itself and extended the penalty to it. But a change in law did not by any means imply a change in practice.

England, though by treaty in many cases she adopted the principle of free ships, free goods, maintained throughout her belligerent relations the old doctrines of the innocence of neutral merchandise on enemy vessels. In the eighteenth century, however, England originated herself a fresh restriction upon neutral trade based upon the same spirit as the French ordinances, viz.: to put a stop to the commerce of the enemy. At that time, as Montesquieu wrote, "commercial monopoly is the leading principle of colonial intercourse"; and what was called the Rule of 1756—because it was first practised in that war, though it endured to the end of the Napoleonic struggle—forbad neutrals under penalty of confiscation to take part in war time in the colonial and coasting trade of enemy countries from which they were debarred in times of peace. It was argued that such action amounted to an interference in the war by a neutral on behalf of one side. "It is a trade," said Lord Stowell,[1] "which he can obtain in war by no other title than by the success of one belligerent against the other, and at the expense of that very belligerent under whose success he sets up his title." The principle involved was really that belligerent exigencies prevail over any advantages which the neutral may gain through the existence of a contest. The neutral was only allowed to suffer losses, and not to make gains in war.

England's innovation prejudiced her still further in the eyes of Continental nations who already feared and hated her maritime supremacy. A favourable opportunity for asserting neutral

[1] The Immanuel, Snow, p. 503.

rights presented itself when England, in 1780, found herself at war alone with the United States, France, Spain and Holland. Russia, not for the last time foremost in enunciating lofty principles which had the additional merit of serving her interest, drew up with the smaller Northern Powers a declaration of neutral rights, to which the other belligerents willingly assented, because they thought that they would press most heavily on the great maritime power of England, who largely depended for her success on destroying the commerce of her rivals. The first Armed Neutrality of 1780 demanded a reform of the usages of blockade and contraband, and in place thereof a natural system, founded on principles of justice which should have permanent validity; the abandonment of the Rule of 1756, the adoption of the maxim of free ships, free goods, and the freedom of all vessels under neutral convoy from search. All these provisions were limitations of belligerent rights, and, had they been accepted, would have made a vast reform in maritime warfare. The combined States covenanted to observe them, but their sanction was only a passing expediency, and the great European struggle in which almost all the great nations were plunged from 1792—1815 provided a striking commentary upon their terms, and showed how helpless were small neutral powers when their privileges were attacked by powerful belligerents. Still, the demands of the armed neutralities were a "Petition of Right" which, though unrealised at once, remained the ideal towards which practice during the last century approximated.

In the history of neutrality, as in the history of belligerency, the declaration of modern principles was followed by a reaction in practice to the most utter violence, owing to the fierce character of the Titanic strife which convulsed Europe after the French Revolution.

The Napoleonic struggle marked at once the beginning of a true appreciation of neutral duties, and the extreme depreciation of neutral rights; and the power which elucidated the one and suffered the other was the United States, the only considerable nation of European civilisation that was not involved in warfare. Against them the Rule of 1756 was extended by England to prohibit any trade whatsoever, ordinary or extraordinary, between

a neutral and the colonies of an enemy, and in order to prevent evasion of the law a new principle was enunciated which has since played a large part in the law of contraband.

By the doctrine of "continuous voyages," propounded by Sir W. Grant in the case of "The William,"[1] no mere touching at a neutral port could prevent the confiscation of a neutral vessel if its voyage was really from a colony to the enemy's country. The Court looked to the voyage as a whole and the true intention of the trader, and not at his colourable pretensions. Against the United States again, in particular, were directed the Milan and Berlin decrees of Napoleon and the retaliatory Orders in Council of England in 1812. These decrees practically declared the whole English coast and the whole coast of the French Empire respectively under blockade, and involved the absolute cessation of neutral commerce.

The enormous armies employed on both sides were not deemed sufficient weapons in the Titanic struggle; a ruthless war on commerce upon both sides was entered upon, and in that war the neutral was threatened on either side by extreme penalties if he interfered. As Mahan says of Napoleon's Continental decrees: "Having settled the business of belligerents, with the exception of England, very much to his liking, he was now on the point of settling that of neutrals in the same way."[2] And England, in reply, as a matter of self-preservation, adopted a like policy, so that the one neutral that possessed an important commerce was fairly caught between the devil and the deep sea. In fact, the demand of either belligerent had come now to be, not that the neutral should refrain from helping his enemy by extraordinary warlike commerce, but that he should actually help him against the foe by desisting from his *ordinary* commercial relations with him. Such a demand was more than a self-respecting neutral could tolerate, and the United States, which, under Jefferson, had laid down the essentials of neutral duty, became, under Madison, the champion of neutral rights. The war of 1812—1814, though in its result indecisive, had at least this great consequence, that it led

[1] Snow, p. 505; 5 C. Rob. 385.

[2] Mahan, "War of 1812—1814."

the nations to recognise that there was a limit to belligerent demands and to neutral acquiescence.

As the French Revolution had enunciated the principles which govern the relations of belligerents to the private property of an enemy, so at the end of the wars which sprang from the French Revolution a clearer idea had dawned of the principles which should govern the relations of belligerents and neutrals. These principles were given legal form and almost universal validity in 1856 at the end of the next considerable European war, when the representatives of the great European powers signed the Declaration of Paris.

With this charter, which sealed the work begun by the Armed Neutrality, begins the history of the modern usage of war in its relation to neutral property. The United States did not sign the Declaration because their representatives held that it did not go far enough; but in practice during the Spanish-American war of 1898 they followed its rules. Its provisions may, therefore, be considered as the accepted *jus gentium*, though, as will be seen, the ingenuity of belligerent nations has contrived to whittle away some of the safeguards that they intended to give to neutral commerce. Even the first article of the Declaration, the apparently absolute abolition of privateering, has been to some extent evaded by the formation of "Volunteer navies" by nations at war. Prussia invented this device in 1870, and it was followed and improved upon by Russia in its war with Japan, when the "Smolensk" and the "St. Petersburg," sailing through the Dardanelles as merchantmen, suddenly transformed themselves into cruisers and started to prey upon neutral shipping. To-day, the chief maritime powers have arranged to turn parts of their mercantile marine into commerce-destroyers at the outbreak of war. The second provision of the Paris Declaration, which makes the neutral flag cover enemy goods when they are not contraband, is partially defeated by the extension of contraband and the enforcement against neutral vessels of the continuous voyage principle. The third provision, which exempts neutral goods from capture on enemy vessels, is threatened by the growing habit of sinking enemy prizes.

The law has changed, but the determination of the belligerent not to allow neutral individuals to interfere at all with his rule of force against his enemy is as firm as ever. The rights of neutrals are, indeed, always in a position of unstable equilibrium. In their very nature they are the results of a compromise, and, like most compromises, they have little stability. On the one side, the neutral desires and thinks it is his right to carry on his trade with either belligerent without any change from the conditions of peace time; and he may even hope to increase it through the greater need of his customer and his greater demand for imported goods. On the other hand, either belligerent wishes to impair the resistance of his adversary as far as possible, and to prevent him from receiving not only military supplies but sustenance of any kind. In the case of his own subjects and the subjects of the enemy, he endeavours to cut off all trade by confiscating their goods and their vessels which are engaged in it. But in the case of neutrals he is compelled by the common opinion of nations to reduce his demands to the penalising of all trade which directly conflicts with his military operations, or directly assists the operations of the enemy. In the stress of war, however, he is always apt to give the rights which remain to him the widest possible extension, and to limit very closely the indulgences which neutrals have won. There is, then, the more need that the laws prescribing the relations of neutrals and belligerents should be clearly defined and fixed by an international jural body, and revised from time to time when the experience of war has proved the need for revision. The next Hague Conference will doubtless consider the law of neutrality carefully, and will probably be able to draw up a code which will be binding upon civilised nations. Even so, however, the position of neutrals will still be inadequately secured, for in the stress of war laws are distorted and evaded and openly violated unless they have a coercive sanction.

It is, perhaps, not too much to hope that the Hague Conference will be able to insist upon the institution of an International Court of Appeal or Prize Court, to which neutral

owners who feel themselves aggrieved by the sentence of the belligerent tribunal may, at their own risk, carry their cause. But the broader improvement in the position of neutral traders can only come from the fostering and growth of a popular opinion which will limit the belligerent's interference to commerce which clearly and directly conflicts with his military necessity.

CHAPTER IX.

WAR AND NEUTRAL COMMERCE AT SEA.

The primary belligerent right which may be exercised against all the world is the right of self-preservation. When one nation is fighting for life, the convenience of the rest is subordinate to his necessity. The consent of the ages allows him to interpret that necessity broadly. All neutral commerce, even when it is being carried on with another neutral State, is subject to molestation in war, owing to the belligerent's right of search, which is the chief instrument of his *jus belli*, and which overrides temporarily the exclusive sovereignty of the shipowner's state. With certain kinds of trading the belligerent's interference is complete, for by his right of self-preservation he may confiscate neutral property in so far as it affects his military operations and the course of the war; and, by way of penalty and warning, he may attach the offence of the cargo in certain cases to the vessel. He has the right to prevent a neutral subject from supplying his enemy with the means of offence or resistance, and if he is able to effectually watch the whole or part of the coast line of the enemy, he may further forbid neutrals, under severe penalties, to have any communication with that part of the hostile territory. Lastly, he may forbid a neutral to employ his ships for certain services which directly assist his enemy. These belligerent rights comprise the three heads of interference with neutral subjects, known as contraband trade, blockade, and unneutral service. To give full effect to his rights, the belligerent's properly commissioned cruisers have the power of visit and search over all private neutral vessels, and his sanction is the power of confiscating the offending vessel or cargo after it has been condemned in his own Prize Court.

The belligerent's right of search and visit, and, even more, the right of detaining any suspected vessel, is one of his most far-reaching privileges, and also one of the most oppressive upon neutrals; for it involves the innocent trader as well as the carrier of noxious cargoes. So far as the present practice goes, it enables his man-of-war to hold up a neutral vessel in any quarter of the globe, to examine its papers, and, if it thinks fit, to bring it in to one of its own ports for stricter examination. Resistance to this right involves the vessel in confiscation. Even when it turns out that the suspicion of the belligerent was unfounded, and that the vessel is innocent, the Prize Court will seldom award the neutral damages for the delay or even the costs of the enquiry. The English rules upon this point were elaborately argued in the case of two vessels seized during the Crimean war,[1] the "Ostsee" and the "Leucade," which were heard respectively before the Privy Council and the Admiralty Court, presided over by Dr. Lushington. The former Court did, in fact, award damages and costs to the owner where his vessel had been brought in on the charge of an attempt to violate a blockade that never existed. But Dr. Lushington declared that this was only to be done where the belligerent cruiser had no reasonable ground whatsoever for bringing a vessel in. But where the captor had any probable cause for detention he is considered to be a *bonâ fide* possessor, and is not responsible for any losses or injuries subsequent to capture arising from accidental causes.[2] This rule may obviously inflict very considerable losses on neutral trade of a perfectly innocent character. England's demand for an apology in regard to the detention of the P. O. steamer "Malacca" by the Russians in 1902, and Germany's claim against us for the detention of the "Bundesrath" in 1900, point to a growing dissatisfaction among the neutral powers at wanton interference, and their anxiety to make a belligerent pay for the losses caused to their innocent subjects. The same tendency is shown by the demand for the restriction of the right of search, which is dealt with later. It is really remarkable that such a stringent burden upon neutrals has remained to our day in

[1] Cf. Spinks' Prize Cases, 174, 217.

[2] The Betsey, 2 Rob. 93.

almost all its severity. So far from diminishing, the aggressions on neutrals of nations at war tend to become more vexatious, partly because steam-power gives cruisers greater chances of interference than they had in the days of sailing vessels, partly because international commerce is to-day more sensitive than it was a hundred years ago to any check.

In the modern development of contraband we can clearly trace the encroachment of belligerent pretensions upon the legal limitations now imposed on them. From the time of Bynkershoek there has been a continuous movement on the Continent against the retention of the class of conditional contraband; but the action of the French Government in declaring rice contraband of war during their "sort of war" with China in 1884, and the decisions given by Russian Prize Courts during the war with Japan, show that the Continental limitation to two classes weighs more hardly upon neutral traders, and its universal adoption would certainly not be to their good. It is the English rule that absolute contraband may be seized if consigned to any belligerent port, but conditional contraband only if consigned to a belligerent naval port, so that it may be presumed that the goods are destined for the enemy's forces. But the Russians, holding as absolute contraband what the English regulations admit to be only conditional contraband—*i.e.*, what is only contraband according to its quality or its destination—condemned cargoes of coal, flour, cotton and railway material wherever they were seized and whatever their place of discharge,[1] despite the fact that each of these commodities can very well be used for peaceful as well as warlike purposes. As Mr. Secretary Hay pointed out in his protest at the confiscation of an United States vessel, the "Arabia," for carrying flour and railway material, "they broke down the distinction between contraband and blockade." Moreover, their conduct in condemning the vessel as well as the cargo in these cases of conditional contraband was an absolute illegality. The regular penalty for contraband is confiscation of the contraband

[1] Cf. the cases of The Allanton, The Calchas, The Knight Commander; Smith & Sibley, International Law in the Russo-Japanese War.

cargo. If, however, the contraband part of the cargo consists of three-fourths of the whole, or if the owner of ship and cargo is the same, or if the ship has sailed with false papers or used some other fraud, or lastly, if the cargo is peculiarly noxious, *e.g.*, ammunition, then the ship as well as the goods are confiscated. The ship, otherwise, which carried contraband loses its freight and expenses, but is released.[1] The French naval instructions of 1870, indeed, permit the confiscation of the vessel carrying contraband; but this, according to the most reliable international practice, should only be done in the aggravated cases mentioned above.

Far more serious, however, than the Russian aberrations in regard to sentences for contraband trade was their habit of destroying neutral prizes instead of bringing them into port for adjudication. Here they professed to be exercising what was a regular right of the belligerent; and they do, in fact, find support from some modern jurists. Their Naval Regulations of 1895 (art. 21) and of 1901 (art. 40) permit the destruction of neutral prizes. Similarly, the French code permits it, while the English, American and Japanese manuals discourage it, but do not positively prohibit it. But putting aside pleas of necessity, on general principles the practice is wrong and should be prohibited, saving only special cases. Where a neutral vessel, seized for carrying contraband, cannot, owing to some genuine necessity, be brought into port by her captor, it is not unreasonable that she should be sunk, provided always that her cargo is clearly and certainly contraband and her papers are secured, so that there may be proper evidence of her character. But in such cases full compensation is to be paid to her owners unless the ship, as well as the cargo, would have properly been condemned by a Prize Court. In the cases of "The Acteon" and "The Zee Star,"[2] Lord Stowell made it clear that when the innocent neutral vessel is destroyed by the captor, the owner is entitled not only to restitution but to damages and costs; unless the conduct of his vessel is partly responsible for the destruction, when he is entitled to restitution only. The

[1] Cf. The Ringende Jacob, 1 C. Rob. 90; and The Neutralitat, 3 C. Rob. 296.
[2] Cf. 2 Dods. 48; 4 Rob. 71.

award of damages to the neutral implies that the destruction is a tort, which, as against the neutral, cannot be excused by the plea of necessity. So far only is the practice of sinking neutral vessels at sea justifiable. When the vessel carries doubtful contraband, or where there is no pressing necessity, the practice is utterly reprehensible. It involves a misunderstanding of the nature of belligerent rights over neutral property. His conquest, to express it so, is not legally complete till the ship or the cargo which he has seized has been condemned by a competent Court. Until that event, only the necessity of war, strictly interpreted, can give him a right to dispose of his capture.

No doubt the considerations which impel modern cruisers to destroy their enemy prizes—the preciousness of coal and the difficulty of sparing prize crews, etc.—impel them also to sink neutral prizes, but they have not the same right in the one case as in the other. At the best the captor has a right to seize or destroy the cargo if it is absolutely contraband; and if it is conditional contraband he may equitably exercise a right of pre-emption at a fair market price. But the ship is not his property to deal with. Dr. Baty has proposed a rule which might well form part of the laws of war on sea: "In no case is it permissible to sink or otherwise destroy a neutral prize; but absolute contraband may be removed to another vessel or jettisoned in case of necessity."[1] It might be advisable to substitute "certain" for "absolute," for a clear case of conditional contraband should be under the same conditions as a case of goods absolutely prohibited. The excesses of the Russian navy in sinking the English vessels the "Knight Commander," the "St. Kilda," and the "Hipsang," show a more flagrant violation of neutral rights than has been perpetrated since the Napoleonic wars, and they cannot be palliated by the plea of necessity, which has usually been the scapegoat of all belligerent violence. It is only fair to add that the Supreme Prize Court at St. Petersburg has reversed the sentences in the two last cases, and awarded compensation to the neutral owners.

Besides the sinking of prizes, modern naval war has exhibited another innovation which, though it is a fresh encroachment

[1] Law Magazine, 1906.

upon neutral trade, is based upon the general principles of belligerent right to stop contraband trade, and is so far justifiable. This is the doctrine of continuous voyages or continuous transport, which was first extended to contraband in the American Civil War. In the revival of the rule of 1756, during the Napoleonic wars, which prohibited neutrals from engaging in the colonial trade of a belligerent, the English Admiralty judges, Lord Stowell and Sir Wm. Grant, laid down that a colourable landing[1] of the cargo at a neutral port did not protect a neutral vessel engaging in such trade from confiscation, if the cargo was afterwards shipped to the enemy's country. During the American Civil War of 1862—4, many English vessels endeavoured to run the blockade of Southern ports, or to convey munitions of war to the Confederates; and in order to avoid detention in the course of their ocean voyage, their papers were frequently made out to one of the neutral ports off the coast of the United States, in the Bermudas or Mexico. Sometimes there was only a colourable calling at the neutral port, sometimes a genuine transhipment; but in either case the Federal Courts refused to pay respect to the fiction, and they condemned the vessels brought in despite their neutral destination, if there was any reasonable suspicion that their contraband cargo was destined for the enemy. This was the basis of their decision in the cases of "The Stephen Hart," "The Bermuda," "The Peterhoff," "The Springbok."[2] In the first of these cases the Court held that "contraband goods are to be condemned if destined for the use of the enemy, and that the offence is in the destination and intended use of the property laden on the vessel and not in the incidental ancillary voyage of the vessel." This was a departure from the rule of Lord Stowell, who said, *obiter*, that a ship can only be condemned out of her own mouth; and in the leading case of "The Imina"[3] he laid down that goods going to a neutral port cannot come under the description of contraband, even if they are probably destined

[1] Cf. The William, etc., Snow, p. 505.
[2] Snow, p. 813; 5 Wallace's Reports.
[3] 3 Rob. 167.

for the enemy's service, because the vessel must be taken "*in delicto*" in the actual prosecution of a voyage to an enemy's port.

There was, however, at least one precedent for the American action in the condemnation by a French Court in 1854 of the "Frau Howina,"[1] a Hanoverian ship captured on a voyage from Lisbon to Hamburg with a cargo of saltpetre, on the ground that the real destination of its cargo was Russia. There was also an *obiter dictum* of the distinguished American judge, Story, delivered during the English-American War of 1812—14, that if contraband goods were destined to a neutral port for the direct and avowed use of the enemy's army or navy, they would be confiscable. And he gave as example the case of goods assigned to a Spanish harbour where the British fleet might be lying.

The action of the Federal Courts during the Civil War was doubtless an extension of this principle, and much was written at the time, and more has been written since, against their "Guesses at Truth." In England especially much feeling was aroused by the condemnation, and in the case of Hobbs *v.* Henning,[2] which dealt with an insurance contract on a part of the cargo of the "Peterhoff," Erle, C. J., spoke disparagingly of the American judge's verdict based on an allegation of mental processes. But his decision that the insurance on the cargo was good cannot be taken as authority against the American decision, because in the following year the Court of Common Pleas, in the case of Seymour *v.* The London and Provincial Marine Insurance Co.,[3] held that a policy upon another part of the cargo of the "Peterhoff," with warranty against contraband of war, was invalid, thus overruling the former case upon this point. Mr. Justice Willes declared that the criterion of contraband was the intention that the goods should, in the course of the same transaction, go on to the Confederate States, agreeing therein with the American judges.

The distinction must be clearly made between the evidence upon which the American Courts condemned the neutral vessels and the principle which they applied. As regards the

[1] Calvo, sect. 2761. [2] 17 C. B. 791; 34 L. J. C. P. 117. [3] 41 L. J. C. P. 193.

first, they may have been at fault; as regards the second—continuous transport in contraband trading—later practice and the general reasoning of the case justify them. Much has been made[1] of Lord Stowell's decision in "The Imina" and on other cases where he acquitted noxious cargoes consigned to Emden, a neutral port in Prussia which was notoriously a place where contraband was smuggled by canal traffic to Holland. But Lord Stowell's decision and dicta, great as they are, are not binding rules for all times and all circumstances.

In this connection it is interesting to note that in the latest English prize case, "The Mashona," already referred to,[2] the criterion of ultimate destination was applied to merchandise seized on the ground that it was trade with alien enemies. The boat was destined for Lorenzo Marques, a neutral port, but the goods were proceeding to the Transvaal, and were, therefore, condemned. The conditions of modern commerce, and more particularly the spreading of the network of international railways, which makes it easy to transport contraband goods from a neutral port to a belligerent destination, have justified a change, and the two Governments whose publicists formerly considered the practice reprehensible have followed in the last years of the nineteenth century the American precedent. International law is a progressive thing, and it is not to be expected that its progress will always tend to the greater security of property and the respect of neutral trade. The Prize Courts of three great maritime powers have held within the last fifty years that the ulterior hostile destination of contraband goods entitles a belligerent to seize them though the voyage of the ship will end at a neutral port, and this goes far to establish a new usage. In 1897 the Italians were at war with Abyssinia, which has no sea-port, but in the Red Sea one of their cruisers seized a Dutch ship, the "Doeljuik," laden with contraband of war, and proceeding to the French port of Djiboutil; and the Court condemned it on the ground that the goods were destined for Abyssinia. This case was the more

[1] Cf. Atherley-Jones, War and Commerce.

[2] Cf. p. 51, *supra*.

remarkable because there had been no declaration of war, and neutrals are not generally bound to recognise a state of war till the belligerents have made a declaration, or issued a proclamation to them.

Still more significant of the change in practice was the action of the British Government during the Transvaal War in stopping and searching vessels for contraband in African waters. The South African Republic possessed no sea-board, but it was a matter of notoriety that they received munitions of war from neutrals through the Portuguese port of Lorenzo Marques in Delagoa Bay. In December, 1899, and January, 1900, three German vessels, the "Herzog," the "General," and the "Bundesrath," were seized on suspicion of carrying contraband, but after search they were set free as there was no evidence of contraband trade. The German Government, however, strongly protested, but Lord Salisbury maintained in the face of the English Admiralty Manual that the seizure was perfectly justifiable, and quoted the opinion of Bluntschli, "Si les navires ou marchandises ne sont expédiés à une destination d'un port neutre que pour mieux venir en aide à l'ennemi, il y aura contrebande de guerre et la confiscation sera justifiée." In this particular case compensation for delay was paid to the neutral owners because the suspicion was unfounded, but the new principle may be taken to have been accepted by England. Seeing that the offence of contraband lies in the goods and not in the ship, the disregard of the ship's destination is defensible; for the basis of the belligerent right against the neutral trade is that he may prevent articles of an offensive nature being carried to his enemy. Twiss' rhetoric about the doctrine of prospective continuity "opening wide the floodgates of visitation and search which it was one object of the Declaration of Paris to close partially" is beside the mark. The search of vessels may take place in any case: the new doctrine merely permits the result of the search to be acted upon when there is suspicion amounting to certainty.

The principle of continuous transport, though not extended by Lord Stowell to contraband, was applied by him to what has been known as "analogues of contraband," and what is better

called "unneutral service." A neutral vessel is forbidden to carry soldiers or officers for the belligerent, to transmit messages, or carry official despatches which may deal with the conduct of war; and the penalty for a breach of this rule is the confiscation of the neutral's ship, and any part of the cargo which belongs to him. In the case of "The Rapid,"[1] an American vessel bound from New York to Tonningen, two neutral ports, Lord Stowell suggested that the neutral destination would not protect the master if he had reason to think that he was carrying offensive despatches. To-day the offence of unneutral service may be incurred by the transmission not only of signals but of wireless telegraph messages, and during the Russo-Japanese War the Russians seized the yacht of the special correspondent of the "Times" (the "Haimun") on the suspicion that it was being employed to send messages of their movements to the Japanese fleet. They issued a note to the Powers that they would treat correspondents whom they caught in the act as spies, and confiscate their vessels and apparatus. The first part of the threat was unwarranted, but the second seems justified on the general rules of unneutral service. The spread of submarine cables and of wireless telegraphy is creating a new question in the relation of belligerents to neutral property, which has not yet been authoritatively treated either by conventions or Prize Courts. The old law and the old cases about the carriage of despatches are almost obsolete, owing to the change in the method of communications, but the principles embodied in them may be applied in part to the new conditions: and, for the rest, the rules of military occupation in its relation to private property on land apply. It is submitted that the practice of nations should proceed on the following lines, making no distinction in all cases between public and private cables:—

(1) Cables uniting two neutral countries should in all cases be inviolable.

(2) The belligerent should have the right of cutting cables uniting a neutral and the enemy country, either if he has military occupation of the coast where the cable

[1] Snow, p. 480; Edwards' Reports, 228.

reaches the land; or if he is blockading the port and can raise the cable, then within the territorial waters of the enemy, or on the high seas. The cable should be restored as soon as military needs permit.

(3) The belligerent may cut and destroy the cables between his own and the enemy country.

(4) Whenever the cable of a neutral country is damaged, the belligerent should pay compensation.

These are practically the rules which were recommended by the Institute of International Law in 1902, and their guiding principle is that the belligerent may interfere with cables when they seriously affect his military movements, but then only. Upon the same principle he may seize all public and private wireless telegraphy stations in the enemy's territory, or seize any neutral vessels which endeavour to send wireless messages to a port which he is blockading or to the enemy's fleet. For such conduct is an unwarrantable interference with his military operations, and subjects the wrongdoer to the full penalties of unneutral service.

In this direction, then, the belligerent's control over neutrals will probably receive extension. On the other hand, there is a growing movement for exempting regular mail steamships from search and detention by belligerents, who have by existing law a technical right to overhaul their bags on the chance of finding some incriminating document. Seeing that the mutual intercourse of large parts of the world depends upon the regular service of these lines, and also that the messages of a belligerent to-day almost invariably go by telegraph and not by letter, the gains to be obtained from such interference are quite incomparable with the injury caused to neutrals. The detention of the German mail-boat, the "Prinz Heinrich," in 1903 was of a piece with the other reactionary tendencies in Russian naval practice. They applied also the old prohibition to neutrals of engaging in the coasting trade of the enemy during war in the case of the German vessel "Thea." The ship was destroyed before condemnation, but after the war compensation was paid to the owners.[1]

[1] Cf. The Times, March, 1907.

The Japanese likewise put into practice the old rule, when their Courts, in 1905, condemned the United States steamer "Montara," which during the war had taken out goods to Alaska, and was proceeding thence with a cargo of sealskins to Russian ports. It was alleged that this trade was conducted with the special permission of the Russian Government, that it amounted to the carrying on of trade by a neutral which was closed to him in peace time, and that thereby the neutral ship had identified itself with the enemy service.[1] The Japanese judges here applied in a new form the rule of 1756, which had been neglected for a century, and indeed declared obsolete, and applicable only in forgotten corners of the earth's surface. The revival of protective bounties to national shipping has to some extent justified the revival of the old belligerent practice, and nations at war will always look with suspicion upon the conversion of neutral vessels to the use of the enemy.

The same Japanese Court condemned the British ship "Australia," because it had been actually chartered to the Russian Government or their agents. Yet, the mere fact of a belligerent charter does not make a ship *ipso facto* confiscable. It is only when the chartered ship passes under the physical control of the belligerent and is employed in the furtherance of hostilities or participates in the actual fighting that condemnation is regular. Thus, in the old case of "The Orozembo," the neutral vessel which was condemned was conveying high officers of the enemy (Holland) from Lisbon to the Dutch colony of Batavia;[2] and in the case of "The Friendship,"[3] decided about the same time, the condemned vessel was acting as an enemy transport. In both these circumstances there was more than the act of chartering by the enemy, and sufficient evidence to warrant confiscation on the ground of voluntary identification of the neutral with hostile service. The Japanese Court showed a tendency to extend the old rule against unneutral service beyond the old standpoint, not only to where there is no *mens rea*, but to where there is only possible identification

[1] The Times, Dec. 22, 1905. [2] Snow, p. 483; 6 C. Rob. 430.
[3] 6 C. Rob. 420.

with the enemy. In this aspect, it is only one of many indications given in the Russo-Japanese War that belligerents will in future stretch the rights left to them against neutral trade to their extreme limit. This is one of the indirect results of the Paris Declaration, which makes it impossible to attack enemy property under a neutral flag. The belligerent being unable to touch the property as such, tries to incriminate the neutral ship wherever he can stretch the law to that effect; and in the result the neutral owner, in particular cases, is made to pay for the indulgence granted generally to the neutral flag.

Ever since the first Armed Neutrality of 1786 there has been a strong movement on the Continent in favour of exempting neutral merchantmen from the belligerent's right of search when under the convoy of ships of war of their own nation. The claim was first made by Queen Christina of Sweden in 1653,[1] during the war between England and the United Provinces, and it was repeated by the Dutch in 1654, when they were themselves neutral during the war between England and Spain. At the end of the eighteenth century the demand for the indulgence had become strong, and treaties embodying it were common, but England steadfastly refused to yield to it. Lord Stowell condemned a number of convoyed Swedish merchantmen who had resisted the search by British cruisers, and laid down the law upon the subject in the leading case of "The Maria."[2] "The authority of the sovereign of the neutral country being interposed in any manner of war force cannot *legally* vary the rights of lawfully commissioned belligerent cruisers, and the penalty for the violent contravention of this right is the confiscation of the property so withheld from search." English Admiralty judges and English statesmen have always refused to recognise that the presence of a neutral ship of war is a guarantee that the convoyed vessels are innocent; as Lord Brougham put it,[3] "the presence of the convoy ship, so far from being a sufficient pledge of their innocence, is rather a circumstance of suspicion." The United States till recently followed

[1] Cf. Hall, op. cit. p. 718 ff.

[2] Snow, p. 515; 1 C. Rob. 350.

[3] Hall's International Law, p. 725.

the English rule, but their naval code of 1900 exempts convoyed merchantmen from search. This is a significant indication of the trend of modern opinion, in view of their earlier usage. The English attitude in this, as in other questions of contraband, is in favour of individualism, *i.e.*, of leaving the belligerent Government to deal with the individual neutral trader; the Continental publicists and Governments alike agitate for interference of the neutral State, so as to eliminate the interference of the combatants. The difficulty of transporting a number of vessels of different rates of speed in one body will possibly make the question of convoy in future mainly an academic one; but in the interests of comity and good feeling with neutrals, England would probably be willing to adopt the attitude which she held towards Russia in 1801, when she agreed to accept the guarantee of the neutral officer in charge of the convoy, unless there was ground for suspicion; and in such a case the belligerent commander was to search the vessel in the presence of the officer. This is a limitation of the right of search which it is not unreasonable to concede.

The legitimate converse of the freedom of convoyed merchantmen is the confiscation of cargo of a neutral owner upon an armed merchantman of a belligerent. The American decisions allow confiscation only when the neutral owner is found guilty of complicity in the resistance of the vessel; (the "Nereide"[1]); while Lord Stowell held that complicity was implied by the very act of placing the goods on such a vessel.[2] His severe rule seems just, and it is worth recalling in these days of liners convertible at short notice into war-ships. Property captured on an armed Nord-Deutscher Lloyd steamer during war with Germany would be fair prize, for the neutral shipper must be regarded as having intended resistance.

The most oppressive restriction which a belligerent to-day may exercise over neutral trade is his right to blockade a port or a portion of coast-line whenever he can do so effectively. When blockade by sea forms a part of siege operations against an enemy's town, the prohibition of all neutral trade with the

[1] 9 Cranch, 388.

[2] The Fanny, 1 Dods. 448.

town, and the confiscation of any vessel which endeavours to violate the blockade are the perfectly natural and intelligible rights of the belligerent. His ships at sea only perform the same office as his troops upon land. This is equally true when his purpose is to prevent any supplies from the sea reaching a hostile land force. Here the ships are virtually cutting off lines of communication. But the case is very different with what are called commercial blockades. Here the belligerent claims the right of barring access of all innocent trade to any port—and in fact any length of coast, which he can guard by his fleet—even although he is conducting no other military operations in that area, and is not directing the movement against any land force of the enemy. It is really an operation peculiar to maritime warfare, which unfortunately presses even more on neutrals than enemies. The right in some cases can hardly be justified by military necessity, but it is said to be impossible to distinguish in practice a commercial from a military blockade, and the results of the two shade into one another. It is also argued that a nation strong in naval power should have equal rights of besieging with a predominant military nation. Modern conventions have not disputed the general legality, but they have defined the conditions of this right. Since the Declaration of Paris, 1856, a blockade, to be binding, must be effective, *i.e.*, the blockading power must be able substantially to prevent any neutral trade from approaching the prohibited area. Continental powers, since the time of the Armed Neutralities, have tried to lay down fixed rules for the number and disposition of ships necessary to maintain a legal blockade; but the Anglo-American practice has always been more elastic and has recognised a valid blockade whenever the force employed does in fact make it dangerous for neutrals to enter. The vague nature of the Paris Declaration and the practices of the American Civil War and the Danish war of 1863—1864 suggest that our interpretation of blockade will be generally followed.

Commercial blockade very seriously affects the trade of the enemy, especially when applied to a large port, and it may indirectly be of immense value to military operations and the general operations of the war. This was admirably illustrated

in the American Civil War. Until that struggle American statesmen had questioned the legality of commercial blockade; and John Marshall, C. J., wrote in 1800:[1] "It is difficult to remit the conviction that the extension of blockade to towns invested by sea only is an unjustifiable encroachment on the rights of neutrals." And Mr. Cass, in the middle of the nineteenth century, on the breaking out of the Italian war, issued a circular to the United States representatives in Europe to the same effect. Yet less than ten years later his own Government owed its preservation very largely to the exercise of that right which he condemned. The blockade of the whole coast-line of the Confederate States by the Federal fleet, which was the largest blockade known to history, was the chief means of weakening the position of the South, and was as important a military operation as Grant's or Sherman's campaigns. Captain Mahan says: "If the principle of Marshall had been established in International law before 1863, innocent private property would have gone freely to the Southern ports; commerce, the source of national wealth, would have flourished in full vigour; and the price would have been the killing of hundreds of thousands more men in an attempt to maintain the Union, which would probably have failed, to the irreparable loss of both sides."

Besides historical testimony, which vouches for its military value, commercial blockade is supported by the fact that to destroy the communications with neutrals by sea is not less justifiable than to destroy them by land, and to do the latter is one of the first duties of an invading army. The imposition of blockade is, in fact, the counterpart upon the sea of the regulations issued by the army in military occupation which prevent the trade of the inhabitants with the outer world. The interference with neutrals is the same in either case; but upon the sea it appears harder, partly because it is less rigid. Owing to the less firm hold of the maritime belligerent, violation of his orders is attempted, and is followed by confiscation if unsuccessful; on land it is scarcely attempted. Any maritime power which may fight England in the future will certainly make one

[1] Quoted in Mahan's War of 1812.

of its chief objectives the blockade of part if not of all our coasts, even if he has not landed a single regiment upon our shores; and neutrals will have no proper ground of complaint, because, in doing so, he will be executing a decisive operation of war.

Of course, it may be a question whether torpedoes and submarines have not made large blockades impossible in the future. The investment, however, of Port Arthur by the Japanese fleet partly gainsays this objection, and the modern invention of wireless telegraphy has given the blockading power great assistance, which may counterweigh his added difficulties. Whether belligerents would have a right to blockade a place by means of floating or stationary mines is doubtful. In the case of "The Circassian,"[1] it was held that a blockade may be made effectual by batteries on shore, if supported by ships afloat sufficient to warn off traders; but a belligerent would appear to have no right to lay mines, except in his own or his enemy's territorial waters, and then only stationary mines; and this restriction would probably prevent him from enforcing a blockade by such means. The rights of belligerents in regard to laying mines are still undecided, but it is submitted that it is an unwarrantable encroachment to lay them in the open sea.

Blockade has proved in the past one of the severest incidents of war upon neutral commerce not only by reason of its thoroughgoing prohibition of trade, but also by reason of the penalties for its violation. Strictly, the offence of blockade-running is an offence of the ship, and primarily involves the confiscation of the ship, but the ship contaminates the cargo when knowledge of the blockade can be brought home to the owner of the cargo (*v.* "The Mercurius")[2]; and in modern times the knowledge of the owner is always presumed, and strong evidence is required to rebut it. In effect, therefore, the penalty is the confiscation of ship and cargo. Moreover, by the Anglo-American practice, as soon as a belligerent has publicly notified a blockade to neutral Governments, any ship sailing for the place blockaded is *in delicto*, and can be seized, and brought

[1] 2 Wallace, 138.

[2] 1 C. Rob. 80.

in for condemnation. The offence is committed from the moment of sailing for the forbidden place. Even if the master of the ship is ignorant of the notice, that does not excuse him to the belligerent, though he may raise a claim of compensation from his own Government.[1] The notice is held to involve a *presumptio juris et de jure*. The English practice distinguishes, indeed, between blockades by notice and blockades *de facto*, which arise when the commander of a station establishes without notice a practical investment. In this case, a neutral vessel cannot be seized unless it has, after warning from the outlying ships, still endeavoured to enter the place. But even if there be wrongful seizure in such a case, the captor is not held responsible for any loss which may befall the neutral by detention unless such loss is irreparable.[2]

The French, and the usual Continental, rule requires individual notice to the neutral vessel from the blockading squadron before an offence can be committed; this usage certainly shows more consideration for the trader, but in view of the facilities afforded to blockade-runners by steam power and the notorious gains to be made by the enterprise, the indulgence seems somewhat uncalled for. Something between the English and the French rule would be equitable. Where there is a possibility of a neutral having no knowledge of a public blockade, or a reasonable hope of the blockade having been raised owing to the time which has elapsed since he left port, it seems only just that he should not be condemned without warning. The proclamation of President McKinley in 1898 laid down that this should be done during the Spanish-American War.

By the strict rule, a blockade by notice is taken to continue till notice of its removal is given by the belligerent, and any vessel sailing to the port before such notice is given is *in delicto;*[3] at the same time, if the invested place has fallen before the seizure is made, the best opinion is that the offence has not been committed, even if there was a wrongful intention originally.[4] In the case of "The Circassian," already cited, the American Court, (Judge Nelson dissenting), held "that the

[1] The Neptunus, Snow, p. 490; 2 C. Rob. 110.

[2] The Betsy, 1 C. Rob. 92.

[3] The Columbia, 1 C. Rob. 154.

[4] The Lisette, 3 Rob. 390.

occupation of a city by a blockading belligerent does not terminate a public blockade if it previously existed," but this decision involves the strange consequence that a belligerent can blockade his own ports against neutral trade. Compensation for wrongful capture was subsequently awarded by the Mixed Commission on British and American Claims, so that it cannot be regarded as a legal precedent.

This is true also of the American decision during the same war in the case of "The Springbok,"[1] an English vessel bound from Liverpool to Nassau, in the Bermudas. The District Court of New York condemned the vessel with its cargo, on the ground that her true destination was one of the blockaded ports of the Confederates; but in 1866 the Supreme Court released the vessel but confirmed the condemnation of the cargo because they maintained that it was a case of continuous transportation. To apply this doctrine to blockade is unfair and unreasonable, for the offence is in the ship and not in the goods, as in the case of contraband. And unless the ship be taken *in delicto*, the goods upon it, except they be contraband, cannot properly be confiscated. "Blockade by interpretation" is as gross a violation of neutral rights as the old paper blockades. The decision of the United States Court has been repudiated by the Institute of International Law, and cannot be recognised as a valid authority. The reverse principle is embodied in Lord Stowell's decision on "The Ocean"[2] and "The Stert." In the first case, merchandise which had gone by inland navigation from a blockaded port (Amsterdam) had been shipped from Rotterdam, which was not blockaded; in the second, there was a shipment to Emden, whence the goods were to proceed to Amsterdam. Both seizures were held to have been improperly made by English cruisers. Seeing that the belligerent can check blockade-runners off the port itself, or otherwise has no right to declare a blockade at all, it is unfair to institute blockade by interpretation of neutral ports in the vicinity, on the ground that there is to be continuous transportation to the prohibited places. This, of course, does not prejudice the right of the belligerent to confiscate any noxious cargo upon the

[1] 5 Wallace, 1 ff.

[2] Snow, p. 495; 4 C. Rob. 5, 65.

vessel seized as contraband, and to enforce the principle of continuous voyage against such trading if the evidence of ultimate destination is decisive.

The laws and penalties of blockade apply equally to the egress and to the ingress of enemy and neutral ships, with this relaxation that a neutral vessel is usually permitted to leave the port with any cargo which it has loaded before the proclamation of blockade, or in ballast. A period of grace, usually fixed at fifteen days, is allowed for egress. Enemy property cannot leave it in any case, and therefore any transfer of a ship or cargo to a neutral after a blockade has been announced will be rigorously examined. If there is any fraud[1] confiscation will take place. Further, a vessel which has successfully run the blockade will be confiscated if it is caught in making its egress with or without cargo, and it is held to be *in delicto* and liable to capture until the completion of its return voyage.[2] This is the French rule as well (cf. Ortolan, 2, 355); the offence is not "deposited" till the offending vessel has finished the journey. All these incidents make blockade a far more oppressive right of the belligerent than seizure of contraband.

During the Crimean war an attempt was made to distinguish between the vessels of belligerents and neutrals in the case of blockade to the detriment of the latter. By an Order in Council a period of grace had been allowed to enemy traders, with cargo bound to or from the Russian ports on the Baltic, within which they might pass freely through the English squadron after a blockade had been proclaimed. Several vessels belonging to neutral owners were seized during this period and tried for violating the blockade. In the test-cases of "The Franciska" and "The Johanna Maria," however, it was held that such discrimination was unlawful, that a blockade implied a "universal prohibition of all vessels not privileged by law," and that limited blockades were illegal. In the words of the Privy Council judgment:[3] "It is a gross violation of neutral

[1] The Vrow Judith, 1 C. Rob. 151; Vigilantia, 6 C. Rob. 122.

[2] The Ferdinand Moltke, Tudor, p. 1011.

[3] Moore, 10 P. C. C. 37 ff.

rights to prohibit their trade and to permit the subjects of this country to carry on unrestricted commerce at the same ports from which neutrals are excluded." This principle would seem to exclude the practice of giving licences to the ships of certain neutral powers to assist the blockade which was at one time recognised. The bare right to licence trade of a specific kind remains, but is almost unknown in practice.

The special military needs of the belligerent power give him the special military right of penalising certain kinds of trade with the enemy, but at the same time they do not have the effect of making them illegal. As regards all other persons such trading remains as legal in war as it would be in peace; and contracts dealing with it, in the absence of special provisions in the contract itself, are perfectly good and valid. The leading case of "The Helen"[1] fixed the effect of a breach of blockade in this aspect, and following a series of former English decisions to the same effect laid down that contraband trade and blockade-running are not illegal acts according to the laws of the neutral country, but merely involve confiscation by a belligerent power *jure belli*. The decision in this case was that a contract between "master and owners of a ship to run a blockade was valid, and could be enforced in the Courts." It had been decided in previous decisions that a contract of partnership in blockade-running is valid by municipal law; (*Ex parte* Chavasse, *re* Grazebrook),[2] that the insurance of contraband goods by a neutral trader is a good contract and can be recovered upon,[3] and that a charter-party to carry contraband or goods to a blockaded port is one that must be carried out: because the master is *primâ facie* as cognisant of the blockade as the owner, and there is nothing illegal in the adventure. (Medeiros *v.* Hill.)[4] It was said in the American case of Seton *v.* Low: "A neutral nation has nothing to do with the war, and is under no moral obligation to abandon or abridge its trade, and yet from the law of necessity the powers at war have a right to seize and confis-

[1] Snow, p. 497; L. R. 1 Adm. 1.

[2] 34 L. J. 17; cf. Seton *v.* Low, Snow, p. 475, and Tyssen's Marine Insurance, 105 ff.

[3] Richardson *v.* Marine Insurance Co., 6 Mass. 112.

[4] 8 Bing. 231.

cate the contraband goods, and this they may do from the principle of self-defence. The right of the hostile power to seize does not destroy the right of the neutral to transport." It is in fact a right of necessity clashing with a right of trade; not a conflict of laws.

These decisions make it quite clear that the principles of contract, which a belligerent applies against the trade of his own subjects with the enemy, have no effect over neutral trade with a belligerent. A policy of *laissez-faire* is pursued between a neutral and his own Government; but this rule is subject, in modern States, to one important exception. One particular kind of contraband trading with a belligerent is exempted from the conditions of other commercial adventure, and is regarded by the neutral power as an infringement of its sovereignty. It subjects the property of the subject to detention and sometimes to confiscation, and the subject himself to fine or imprisonment. The modern conception of neutrality recognises the duty of a neutral State to prevent its subjects taking an active part in a war upon a big scale; and although the State does not interfere with ordinary contraband commerce, because such interference would throw an impossible burden upon it, it can and ought to interfere with an extreme kind of contraband trading which is tantamount to organising a hostile expedition—the despatch of an armed vessel of war to one of the belligerents. To commission ships of war is the function of the sovereign State; and no individual may be properly allowed to despatch a ship from a neutral port in belligerent ownership and belligerent service, under the pretence that it is a trading transaction.

The United States was the first to give legal expression to this neutral duty, and their Neutrality Acts of 1794 and 1818 empower the officials of the Government to detain any vessel manifestly built for warlike purposes when circumstances make it probable that the vessel is intended to commit hostilities against a friendly power. The leading cases of "The Santissima Trinidad"; United States *v.* Quincey ("The Bolivar"), and "The Meteor,"[1] show that the United States Courts will

[1] Snow, pp. 408, 412, 418.

not condemn a subject when he despatches an armed vessel to a belligerent port for sale as a *bonâ fide* commercial transaction, but that if there is the intention to despatch her in order to take part in hostilities, even though she be not armed, she may be detained. The decisive consideration is whether the ship, when she leaves the neutral port, should be considered a hostile expedition or merely a commercial venture.[1] The old English Foreign Enlistment Act of 1819 was based on the same principle as the United States Acts; but the history of the "Alabama" and the other cruisers that left English ports to prey upon Federal shipping in the American Civil War, proved that the powers given to the Home Government to detain suspected vessels were not stringent enough. The case of the *Att.-Gen.* v. *Sillem*[2] decided that the municipal Act did not prohibit the building of ships for belligerent powers, though this, by the consent of nations, was a breach of neutrality. Warned by the Geneva Arbitration, which involved the country in a loss of some millions, the British Government passed in 1870 another Foreign Enlistment Act, which puts upon the State an excessive, just as the earlier Act had not placed a sufficient, obligation. It makes it an offence, and provides for seizure, if any person builds any ship "with intent or knowledge, or having *reasonable cause to believe*, that the same will be employed in the service of a foreign State at war with any friendly State, or equips or despatches the ship." To penalise the expectation of an individual trader is to go beyond what a neutral State should or, in fact, can properly do. The English law exceeds in stringency the provisional rule made to govern the Geneva Award by the Treaty of Washington, 1871, where it was laid down that "the neutral Government is to use due diligence to prevent the fitting out . . . of any vessel which it has reasonable ground to believe is intended to cruise or carry on war against a power with which it is at peace, such vessel having been specially adapted in whole or in part within such jurisdiction to warlike use."

[1] Cf. U. S. *v.* Penn, U. S. *v.* Hughes, 69 & 70 Fed. Reports, pp. 983, 973.
[2] 2 H. L. C. 431.

The English Government has interpreted the clause in the Act of 1870 about "despatching a ship with intent that she shall be employed in the belligerent's service" to cover the case of tugs[1] sent out to tow belligerent prizes off a sandbank, and also the case of colliers of another neutral nationality chartered in English ports to carry coal[2] to the belligerent country, when there was a strong suspicion that they were destined for a war fleet. During the Franco-Prussian war a vessel was detained,[3] which was putting out to lay cables along the northern shores of France; but upon it being proved that this was a genuine commercial venture it was released. Foreign countries have no permanent statutes dealing with this aspect of neutrality; but France, Holland, and Italy have issued regulations at times of war forbidding their subjects, under penalties, to assist in any way the equipment or armament[4] of a vessel of war for either belligerent. It may be taken, then, as the modern international usage that a neutral State will seize the private property of its subjects during war, if it consists of a vessel which it reasonably suspects is intended for the warlike service of either side.

Of late years there has been a considerable agitation for a much wider intervention of the neutral State in the commerce of its subjects with belligerent powers; and it is now customary for the neutral State to issue to its subjects, at the outbreak of a war, a proclamation, warning them of the proper penalties of contraband trading. But now more is asked for. It is proposed that the State should confiscate contraband goods which it detects within its jurisdiction, or any vessels which it has reason to believe are about to proceed to blockaded ports; in other words, that it should assume the special rights which the belligerent now exercises. The feasibility and desirability of such a change in international relations will be discussed in the next chapter.

[1] The Gauntlet, 4 P. C. C. 184.

[2] The Menzell and The Caroline, Vol. XXX. Law Magazine, p. 207.

[3] The International, 3 A. & E. 32.

[4] Hall, International Law, p. 614.

CHAPTER X.

PROPOSED CHANGES IN THE LAWS OF WAR AT SEA.

The Hague Conference of 1899 produced, as one of its chief results, a code of the laws of war on land. That code is not quite complete, and may require additions in the sections which deal with neutrals. By common consent one of the chief tasks of the next Hague Conference will be to endeavour to prepare a code of the laws of war upon the sea, especially so far as they affect neutrals. Maritime usages have already attained a considerable amount of certainty and of legal sanction by reason of the institution of Prize Courts and the record of their decisions; but there is still much disagreement on points of principle, as well as of detail, in the conduct of the different nations, and more particularly in the varying practice of England and America on the one hand, and the Continental powers on the other. It is to be hoped that a clear understanding may be reached upon these controversial topics at the Hague, and also that the determination to come to some formal agreement at any price will not induce the Conference to frame laws so vague as to be no index to future action, and no sure restraint upon the caprice of belligerents.

Here it is proposed only to mention and discuss the suggestions most frequently canvassed for the reform of maritime warfare which affect private property.

With the agitation for giving immunity to the private property of belligerents at sea, not being contraband of war, we have already dealt; and reasons have been given for thinking that it cannot be fairly demanded on legal or moral grounds, or on any arguments drawn from the conditions of land-war. And as long as England keeps its maritime preponderance, and experts like Captain Mahan are convinced

that "the blows struck at an enemy's commerce are the most deadly of all warlike measures," so long it is unlikely that this country will be convinced by the argument from expediency. The enormous damage inflicted by the "Alabama" and her few companions during the American Civil War are an index of the efficacy of commerce-destroying, even after the Declaration of Paris. It is, then, improbable that there will be an unanimous declaration against the capture of private property at sea, but certain modifications of existing practice on other points may well be agreed to.

(1.) Mail and passenger steamers, both belligerent and neutral, should be protected from seizure, and, at the same time, it should be made illegal by the municipal laws of every nation for such vessels to carry contraband or noxious despatches. A resolution to this effect was carried by the International Law Association at Christiania, 1905, and the reform seems called for by the economic structure of modern international society. Exemption was, in fact, granted during the Franco-Prussian and Spanish-American wars, and is provided for by treaty between England and France in case of war between them. The gain to the belligerent by the enforcement of his full rights in these cases is quite out of proportion to the general loss, and the burden thrown upon neutral Governments of examining the vessels is not an impossible one to bear.

(2.) Some limit might be set to the area over which a belligerent may exercise his right of search and visitation. During the South African war Great Britain, despite Germany's protest, exercised her right at any distance from the scene of operations; but when, in the war of 1904-5, Russia exercised the same privilege, Great Britain, "now feeling the pinch herself," protested. The present license certainly seems to involve an unnecessary interference with the world's commerce; for the right of search and detention at a distance from military operations involves incalculable loss to innocent traders, for which no reparation can be gained, and at the same time does little to protect the belligerent. On the other hand, it is difficult to put forward any limitation of the right which will not be too restrictive upon the belligerent powers. It was

suggested at the Peace Conference at Milan of 1906 that certain parts of the ocean or the world's great trade routes might be neutralised in the same way as the Suez Canal is neutralised; but, apart from the indefiniteness of these proposals, they seem likely to impose too great a check to be accepted in the heat of war. It has been suggested again that at the outbreak of war either belligerent should proclaim a certain area around the scene of operations within which vessels should be subject to belligerent rights. But here there arises the difficulty of determining beforehand what will be the scene of operations. Doubtless there would be some gain to neutrals if the suggestion were acted upon, however meagrely; just as it was a gain to neutrals when belligerents, in place of a universal prohibition of trade with their enemies, began to proclaim lists of articles which during that war they would regard as contraband. But it is a relief which must be left to the discretion of belligerents. The only jural changes in present procedure that seem feasible are:—

(1) The immunity from search of vessels under neutral convoy, unless there are suspicious circumstances to warrant examination.

(2) The extension of territorial waters for the purpose, which would neutralise several straits that are the highways of the world's commerce. On the other hand, the proposal of Germany to close the Baltic Sea to other nations during war (which has recently been mooted) would appear to be an unjustifiable retrogression to the old attitude of Denmark, which the jurists of the seventeenth century, Grotius and Selden, demolished, it was thought, once for all.

The law of contraband appears to be that part of maritime law which is in greatest need of being systematised. Probably a proposal will be made at the Hague Conference to abolish capture of neutral merchantmen for contraband altogether; for on the Continent there is a considerable opinion in favour of rescinding the belligerent's right of interference with neutrals, and of imposing upon the Government of the neutral State the task of searching all vessels proceeding to belligerent

parts, and detaining any contraband goods that they may find thereon. It is argued that the neutral State already penalises its subjects for participation in an extreme kind of contraband trade, and forcibly prevents such traffic, and that it should extend this principle to make all contraband trading illegal. Such action would render unnecessary the belligerent right of search which is so irksome. The suggestion is one of the indications in International society of that increasing demand for State interference, which in internal relations takes the form of State Socialism. National Conscription has accustomed the peoples of Continental States to continued submission to officials, and hence it seems natural enough to them that State officials should control trade in times of war. But, on the other hand, the feeling for individualism and for adventure remains strong in the great maritime nations. A sea-going people always has a love of liberty and independence, not to say of adventure; and so long as this spirit abides in England and the United States there is little likelihood of an international agreement abolishing the right of search, and imposing upon neutral States the task of detecting contraband. Moreover the proposed change would immeasurably increase the chances of international embroilment during war, when the belligerent may suspect certain neutral Governments of collusion with the enemy. The proposed reform is an uncalled-for extension of the privilege long claimed for convoyed merchantmen, and would impose, if it were strictly carried out, an excessive burden upon neutral powers; if laxly, an excessive curtailment of a belligerent's rights, which in many cases he would not brook. The self-preservation of one State must overweigh the convenience and profit of the subjects of many, where the two things are really in conflict.

The experience of the last century suggests that this proposal is one which may find approval in peace time, but would soon be abandoned in the stress of war. But if the abolition of contraband capture is an undesirable aspiration, its more careful regulation and more certain definition are a pressing need. At present the practice of nations shows most awkward discrepancies in the lists of forbidden articles; and at the beginning of each war it is left to the caprice of either belligerent to impose new

restrictions upon neutrals which it has not recognised, and may even have forcibly opposed, itself hitherto. Till 1904, Russia had always protested against regarding coal as contraband; at the outbreak of war, however, she at once proclaimed it as absolute contraband, together with flour and cotton. Neutral Governments can, of course, object; but the correspondence[1] which passed between the Russian and English Governments during and after the war of 1904-5 shows the difficulty of reaching any satisfactory solution of differences when war is raging. What seems to be required is a definite international pronouncement upon the different heads of contraband trading and the penalties to be attached to them.

The inter-Parliamentary Conference of 1906 passed a resolution that the Hague Conference, in their next session,—

(1) "should by treaty define contraband of war as being restricted to arms, munitions, and explosives;

(2) re-assert and confirm the principle that neither the ship carrying contraband nor other goods on board such ship, not being contraband of war, may be destroyed."

The second proposal comprises a not unreasonable safeguard of neutral rights. It is, however, too much to hope that belligerents would yet agree to the first. So many other articles than those specified may be immediately useful to the enemy, and must therefore be placed under the ban. But it should not be too much to expect that an international agreement will declare that such other articles are conditional and not absolute contraband; *i.e.*, only confiscable when their destination or quality suggests use for the military purposes of the enemy. Provisions bound for a port of military or naval equipment and steam-coal would come within the category of forbidden and confiscable articles. It was unanimously voted at the International Law Association meeting, at Christiania, 1905, that coal should be declared conditional contraband only, and the Hague Conference might draw up a list of the general heads of conditional contraband, which the Powers would covenant to respect.

[1] Cf. Smith & Sibley's International Law in the Russo-Japanese War, Appendices; and Parliamentary Papers, 1905.

The recent decision of the Russian Prize Court at St. Petersburg, which revised the sentence passed upon the "Calchas" by the Court at Vladivostock in 1904, provides an excellent interpretation of contraband, which, possessing, as it does, the authority of Professor De Maartens, perhaps the greatest law-making international jurist alive, might well pass into the law of nations. The Court declared that "'Contraband' is applicable only to specified articles when they are transported on account of or are destined for the enemy, that is, the enemy's Government, contractors, army or navy, and not for private individual subjects of the enemy's country, and more especially for neutral Governments or private individuals of the neutral country."

If legal effect could always be given to this interpretation, neutral traders could have little reason for complaint; for it embodies the guiding principle of the modern law of war, that the belligerent may confiscate only what immediately and directly assists his enemy and strengthens his power of resistance, and may not interfere with private property which does not fall under these categories.

The Institute of International Law, which, in 1896, discussed reform of contraband rules, considered a proposal for the abolition of conditional contraband, but did not accept it. It suggested, however, that belligerents should only have the right of pre-emption in place of confiscation over this class of contraband goods, and this proposal provides a likely basis for international agreement. Conditional contraband is really part of the ordinary trade of the neutral which happens to conflict with the belligerent's need; it is hard to throw a complete loss upon the trader because of this clashing of interests. Absolute contraband, on the other hand, is commonly an extraordinary species of commerce, and so it is properly punished by confiscation; for it is really an attempt by the neutral individual to make large profit at the expense of a belligerent nation's need.

It is to be hoped also that an agreement may be reached upon the laws of blockade, even if it means that the traditional English standpoint is given up. The English claim is that capture of a vessel is legal where there is an original intention

to break the blockade; the French claim is that it is legal only when, after notice, there has been an actual attempt to do so. It is altogether undesirable that neutrals should have to submit to varying restrictions in different wars, and the English practice seems to err in severity upon neutrals. In the case of long voyages it is certainly hard to inculpate a vessel which has a guilty destination from the inception of the venture. For circumstances may well have changed before the destination is reached. Even if a thorough agreement upon principle is not attained, it might be reached upon certain incidents; *e.g.*, that in the case of a public blockade notice to an offending vessel should not be an irrebuttable presumption, that seizure should only be permitted within a certain distance of the blockaded area, and that a vessel may only be seized when its own destination is an invested port. Something might also be done to determine more exactly what is an effective blockade, and especially whether the use of mines is legitimate in blockade.

These "temperamenta" are perhaps all that are to be expected in the laws of maritime capture from the next Hague Conference. Professor Nys[1] has suggested that the time is not far distant when the private property, whether of belligerent or neutral owners, will be immune from capture on the sea. He says that the experience of the past has proved how legal arrangements are gradually extended from the land to the sea, and he instances the extension of the Geneva Convention to ships. He takes it to be the accepted principle of modern warfare that private property is immune on land, and he looks forward to the adoption of this imagined principle by sea. His judgment, however, neglects the important part which "necessity of war" is allowed even in theory to play in the laws of land war, and the larger part which it will certainly play in practice; and it also neglects the essential difference between stationary private property and national commerce carried on by private individuals. It may be that the future will see the grant of immunity on the sea to "innocent" private goods, but it is

[1] Cf. Nys, op. cit.; and also in the Revue du Droit International, 1906.

inconsistent with the idea of war that there shall be immunity to the commerce of enemy or neutral subjects, which is a direct assistance to the purposes of war. The brute law of self-preservation must always assert itself in the strife of nations; all that civilisation can do is to regulate it, and limit its operation to cases of real necessity.

International conferences and the growth of public opinion, it is hoped, may succeed in eliminating from belligerent practice every kind of wanton destruction and confiscation of private property, but they will hardly be able "to introduce a state of things not yet seen in the world, that of a military war and a commercial peace."[1] Improvement in the near future should rather aim at a greater safeguarding of neutral property than at sweeping changes in the relations to enemy property.

The extent to which some Continental theorists press the sacredness of private property in their exposition of international law as it should be ("Droit des Gens"), almost brings their purpose into conflict with the other leading aim of the modern laws of war; which is to humanise national conflicts and to save unnecessary suffering and loss of life. To prevent a belligerent attacking the resources of an enemy as well as his armed forces is really to prolong the war, to increase the sacrifice of life, and to add to, rather than to diminish, the sufferings of national strife. Economical relations must always reflect a serious disturbance in the political world, and the attempt to avoid this consequence brings the supposed law into conflict with fact and makes it of no avail. War in its very nature involves violence, and it is impossible to make its economical conditions identical with those of peace. A code made in disregard of the violent character of belligerent action will not bind belligerents; it will rather lead to revulsion from a too-exacting law into ungovernable licence. There is a limit to the obedience of a belligerent to the rules of war in their relation to private property, and that limit is that they do not seriously interfere with his military necessity, or his effective power against his adversary. This is the limit fixed—if indeed

[1] Cf. Lord Stowell in "The Maria," Snow, p. 518.

it has been genuinely reached—by the Hague laws of war on land; it is the utmost limit that should be aimed at in framing the laws of war on sea. To eliminate all unnecessary and wanton loss to private property of belligerent or neutral, to curtail all privileges of the combatant which inflict an injury on others out of all proportion to his gain—this is the true goal of reform in maritime warfare. If this is achieved at the next Hague Conference, naval war will be at least as humane as land war, and will show more concern to neutral rights of property; and the law will have some chance of becoming a true "light to the nations."

APPENDIX I.

THE HAGUE PEACE CONFERENCE, 1907.

Among the vœux, or pious wishes, which were passed at the Hague Peace Conference of 1899, and which suggest a part of the work that the approaching Conference will have to consider, are the following:—

"The Conference expresses the wish that the question of the rights and duties of neutrals should be inscribed in the programme of a Conference to be held at an early date.

"With a few exceptions the Conference resolves that the following questions should be reserved for examination by future Conferences:—

"(1) A proposal tending to declare the inviolability of private property in war at sea.

"(2) A proposal regulating the question of the bombardment of ports, towns, and villages by a naval force."

To this programme there will certainly be added the consideration of a code of the laws of war on sea.

APPENDIX II.

ENEMY CHARACTER AND DOMICIL.

At the end of the chapter on the Capture of Private Property at Sea, it was suggested that England and the United States might abandon their old position, by which domicil determines the fate of captured property, and adopt the French, and the general Continental, system, which makes nationality the criterion of enemy character. As the question will probably be discussed at the forthcoming Hague Conference, it will be well to investigate it a little more closely. The old practice of nations, and the practice which is still maintained by England, the United States, and Japan, is that all the inhabitants *de facto* of the enemy country, whether natural subjects or resident aliens, are enemies *de jure*, and that their property seized at sea may be confiscated as enemy property. Twiss gives the rationale of this practice:—"When the principle of territorial sovereignty came to be recognised by the nations of Europe as the basis for regulating their mutual relations as nations, the character of an individual for international purposes came to be regarded from a territorial point of view, and personal allegiance ceased to be an absolute criterion of enemy character. Under this system of public law, domicil has become the criterion of national character for purposes of war, and accordingly all natural-born subjects of a belligerent power who may have abandoned their native country, and acquired a domicil in a neutral country before hostilities have commenced, will have effectually clothed themselves with the character of neutral subjects, precisely as every natural-born subject of a neutral power will have clothed himself with the character of an enemy subject by long-continued residence, coupled with the intention of remaining in the enemy's territory."[1]

[1] Twiss, Law of Nations, Vol. II. pp. 299—301.

Twiss gives, as an example of this rule, the case of a British-born subject resident in Lisbon, whose trade with Holland (then at war with England, but not with Portugal) was held innocent. (The Danous, 4 C. Rob. 256.) One exception, however, must be made to his statement. Long-continued residence is necessary to create domicil for ordinary civil purposes, but it is not necessary for the purposes of war. In this case the decisive point is the actual commercial use which the alien has made of his residence rather than its length. Professor Dicey states the distinction between civil and commercial domicil thus:—[1]

> "A civil domicil is such a permanent residence in a country as makes that country a person's home, and renders it therefore reasonable that his civil rights should in many instances be determined by the law thereof. A commercial domicil, on the other hand, is such a residence in the country for the purpose of trading there as makes a person's trade or business contribute to or form part of the resources of such country, and renders it therefore reasonable that his hostile, friendly, or neutral character should be determined by reference to the character of such country. When a person's civil domicil is in question, the matter to be determined is whether he has or has not so settled in a given country as to have made it his home. When a person's commercial domicil is in question, the matter to be determined is whether he is or is not residing in a given country with the intention of continuing to trade there."

The difference is neatly expressed in one of the Rules governing Maritime Prizes which were promulgated by the Japanese Government at the outbreak of the war with Russia (March, 1904):—"The domicil of an individual is the place where he has his permanent habitation; but for the trader the domicil is the place where he mainly carries on his commerce."

The old law, then, affixes enemy character to property according to the origin of the property rather than according to the personal disposition of its owner. If the goods do in fact form part of the commerce of the enemy State, it is immaterial to the other belligerent whether the owner is a natural or a *de facto* subject; for he is not attacking the private property of enemy subjects as such, but rather the commerce of the enemy nation. On the other

[1] Dicey's Conflict of Laws, p. 737.

hand, he properly regards as neutral any merchandise proceeding from a neutral State, whether the owner is a natural-born subject of that State or not. A French critic states the English position well: "An enemy subject resident in a neutral country, carrying on his trade there or living on his income, adds no strength to the State whose nationality he preserves; his labour and his expenditure only enrich the State where he lives. Into the coffers of that State he pours his contributions; it is the budget of that State which profits by his gains or his fortune. Why should the State at war with his country regard him as an enemy when he is of no service to it? But, on the other hand, the neutral subject established in an enemy country is a source of strength and of profit to it. The duties which he pays, the riches which he creates, the income which he spends, augment the resources of the State and the financial power of the nation. Whether he wishes it or not, at least indirectly he helps to support the State; he aids it in the struggle. To exempt him is to spare the enemy; to strike at him is to reach the enemy." [1]

The practical principle by which domicil determined the character of property in war was prevalent throughout Europe till the nineteenth century. But among the other effects of the French Revolution on war, and indeed on political history generally, was the emphasising of the idea of nationality. In private and in public law this idea was made predominant, and the principle of domicil as a basis of rights lapsed upon the Continent.

We have examined already the dictum of Rousseau which makes war a relation of State and State. This may be regarded as a concise expression of the new theory upon which jurists worked; and one of the corollaries which they deduced from it was that a State can only have as its enemies other States, and not individuals, and therefore the individual could only be attacked by a belligerent in virtue of his allegiance to the enemy State. "Residence in a strange country," said the French Court,[2] (when laying down the law upon the subject of enemy character in the case of Le Hardy, 1802), "does not prevent an individual from belonging to the country of his birth. To cease to belong to his country, he

[1] C. Dupuis, "Le Droit de la Guerre Maritime," p. 124. Quoted by Nys in an article in the Revue de Droit International, 1907, to which I am greatly indebted throughout this Appendix.

[2] Le Hardy, Snow, p. 338.

must have voluntarily chosen, and been regularly adopted by, a new country. Without that renunciation of his original country, without that adoption by another which he prefers, he remains always what he originally was—the friend of the friends, the enemy of the enemies, of his native country. And when that country is neutral he remains neutral himself, and should enjoy for his person as well as for his property all the advantages of neutrality."

When we add to the growth of the feeling for nationality and the new conception of war the idea of fraternity among nations, which was enunciated at the French Revolution, we have the basis and the motives of the new principle that was first applied by the French Conseil des Prises in 1802, and which has since passed into the prize law of the land.

"War being a relation between States," continued the Court in the case cited, "a man cannot be compelled to take part in it unless he has manifested the express wish of incorporating himself with the belligerent power in whose land he is domiciled. Publicists in times past, when force still held, more or less, the place of law, may have professed opposite principles, but the continuous progress of civilization, the need universally felt of the growth and the liberty of commercial relations between peoples, have introduced juster notions and have brought into prominence more liberal ideas, which the Government to-day hastens to proclaim as the standard of its policy and the token of its love of humanity."

This language is somewhat rhetorical, but the broad principles there proclaimed underlie the agitation for the general adoption of the French practice, which is supported to-day by nearly all Continental publicists of note. It is urged that the comity of nations demands that the Anglo-Saxon peoples shall give up the conservative usage "which introduces divergences and confusion into the solution of the questions of neutrality, and takes no account of the modern jural notions upon the true nature of the bonds which unite the citizen to the State," while it cannot add to the effective weapons of the belligerent. Characteristically, our present practice looks to the practical result, and shows a disregard of general reasoning; while the Continental practice sacrifices practical considerations for the consistent application of broad principles of jurisprudence. In the interests of international society one principle should prevail. Which of the two systems must yield?

Doubtless some good arguments may be advanced to support the old principle of domicil. It may be said that in land war domicil determines necessarily the fate of property, and that an invading army makes no distinction between native-born enemy subjects or resident aliens when making its requisitions. Why, then, in naval war should a belligerent discriminate? But there is a difference, at least in theory, between taking goods by right of necessity and confiscating them in cold blood, as it were, and by an alleged legal right; and while neutrals accept the one loss with such equanimity as may be, they are embittered by the other. It may be argued, too, that it would be anomalous for England to keep the principle of domicil in private international law and abandon it in public international law; but the argument from consistency cannot be allowed much weight in this country.

The argument already touched upon, that enemy character is applied to goods in their character of national commerce and in view of their commercial value, contains the root principle of the existing English rule; but sound as it is from the common-sense point of view, it undoubtedly conflicts with modern conceptions of neutral rights. Stated very broadly, the claim of neutrals is to-day that their property shall not be interfered with save where military necessity justifies it, and it is difficult to prove military necessity for our present practice. And it may well be a question for our Government whether the gains, which may possibly result from the attachment of enemy character to the goods of neutrals domiciled in enemy country, are not more than counterbalanced by the consequent ill-will of neutral powers.

By the Declaration of Paris these gains must be greatly reduced; and it is submitted that every restriction of the right to capture innocent commerce is to be recommended, except where restriction would conflict effectively with the purposes of war. The reasons advanced in Chap. VII. for the retention of the right of maritime capture against enemy subjects do not apply to domiciled neutrals. The question is as much one of expediency as of law and of comity, and on all grounds we could adopt the Continental principle without impairing our efficiency as a belligerent. And therefore, for the good of the international society, we might consent to the change.

The change logically involves the result that the goods of enemy subjects domiciled in neutral countries would receive enemy character. In practice, however, this would make little difference

to-day, since by the Declaration of Paris the neutral flag covers innocent enemy cargoes, and the merchandise of such domiciled subjects would be carried for the most part in neutral ships.

Possibly the nations might consent to adopt our present practice in regard to such trading, and release it of enemy character on the ground of its origin and its result. If we adopt their system in the interests of their subjects, we could fairly ask them to adopt that part of our present usage which is based on common principles of justice, and which would protect, in however small degree, the trade of our subjects domiciled abroad, if at any time we should be engaged in war.

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